

(16,835.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 271.

JOHN McMULLEN, PETITIONER,

*vs.*JULIA E. HOFFMAN, EXECUTRIX OF LEE HOFFMAN,
DECEASED.ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

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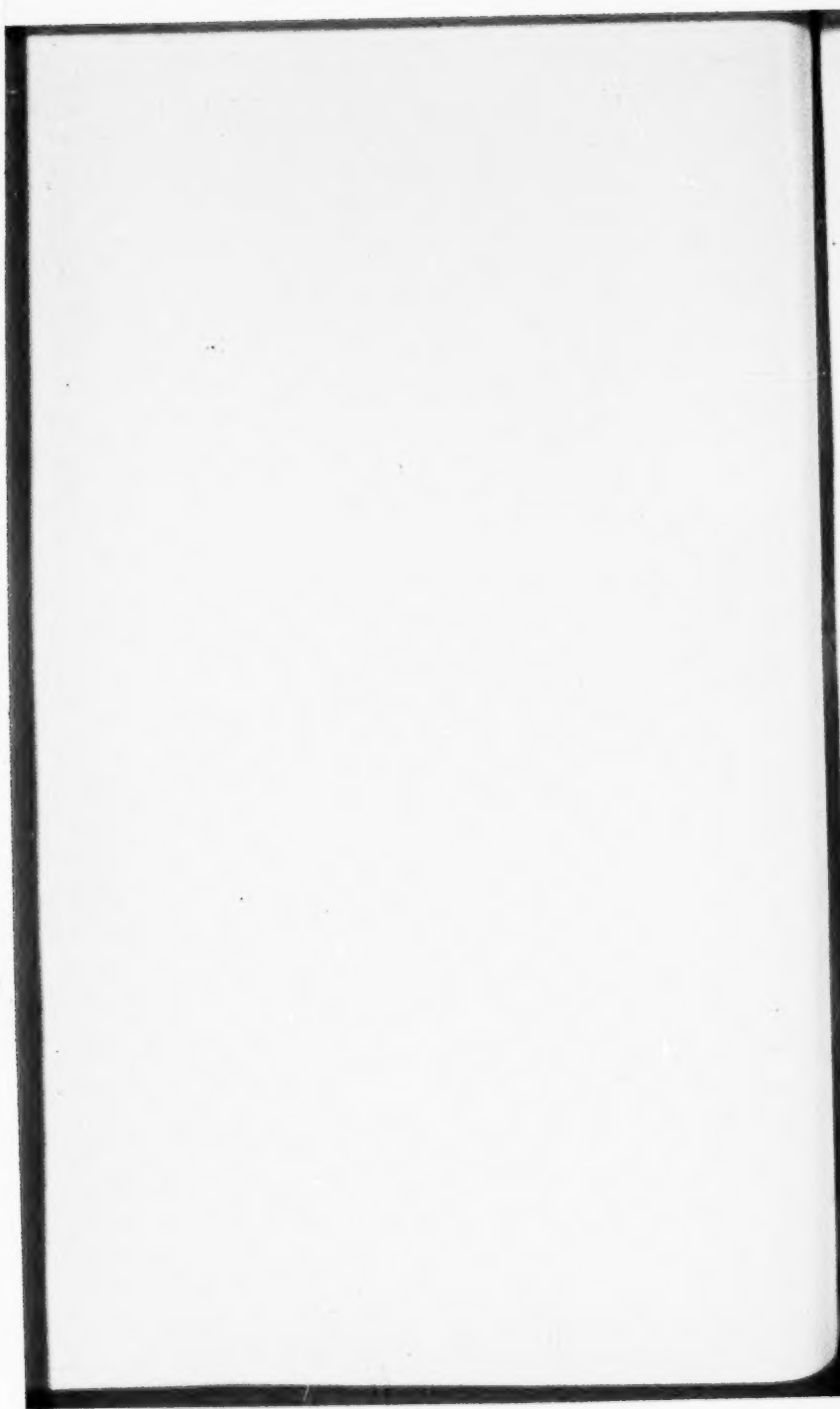
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[1] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix.

No. 2204.

Order Extending Time to Docket.

August 19, 1896.

Now, at this day, on motion of Mr. Rufus Mallory, of counsel for the defendant herein, it is Ordered that the time, heretofore allowed by this Court, in which to file the transcript of record in this cause, in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, be, and the same is hereby, extended to, and including, Monday, the fifth day of October, A. D. 1896.

CHARLES B. BELLINGER,

Judge.

[Endorsed]: Filed Aug. 22, 1896. F. D. Monckton, Clerk.

²²₂₂ [2] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix.

No. 2204.

Order Extending Time to Docket.

September 29, 1896.

Now, at this day, on motion of Mr. Rufus Mallory, of counsel for the defendant herein, it is Ordered that the time heretofore

allowed the said defendant in which to file the transcript of record in this cause on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended ten days.

CHARLES B. BELLINGER,

Judge.

[Endorsed]: Filed Oct. 9, 1896. F. D. Monckton, Clerk.

[3]

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix.

Defendant.

Citation on Appeal.

United States of America, } s-
District of Oregon.

To John McMullen: Greeting:

Whereas, Julia E. Hoffman, Executrix, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from a decree rendered in the Circuit Court of the United States for the District of Oregon in your favor, and has given the security required by law, you are, therefore, hereby cited and admonished to be and appear before said Circuit Court of Appeals at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected and speedy justice should be done to the parties in that behalf.

Given under my hand at Portland, in said District, this 4th day of August, 1896.

CHARLES B. BELLINGER,

Judge.

- [4] Due service of this citation upon me at Portland, Oregon, this 4th day of August, 1896, is hereby admitted.

L. B. COX,

Of Counsel for Complainant.

[Endorsed]: Filed August 4, 1896. J. A. Sladen, Clerk.

*In the Circuit Court of the United States for the District of
Oregon.*

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Last
Will of LEE HOFFMAN, Deceased,
Defendant.

Citation on Appeal.

The President of the United States, to Julia E. Hoffman, Executrix of the Last Will of Lee Hoffman, Deceased, Greeting:

- You are hereby notified that in a certain cause in equity in the Circuit Court of the United States for the District of Oregon, wherein John McMullen is complainant and Julia E. Hoffman, executrix of the last will of Lee Hoffman, deceased, is defendant, the complainant therein has prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree in said cause entered, and has given the security required by law, and that such appeal has been allowed.

Wherefore, you are hereby cited and admonished to be and appear at a term of the said United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, within thirty days from the date hereof, to show cause, if any there be, why the decree appealed from should not be reversed and set aside, and relief be granted to said appellant as by him prayed, and as to justice and equity may appertain.

Witness, the Hon. MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 19th day of September, A. D. 1896.

CHARLES B. BELLINGER,
Judge.

Service by copy admitted at Portland, Sept. 19th, 1896.

RUFUS MALLORY,
Of Solicitor for Deft.

[Endorsed]: Filed Sept. 19, 1896. J. A. Sladen, Clerk U. S. Circuit Court, District of Oregon.

[6] *In the Circuit Court of the United States for the District of Oregon.*

April Term, 1895.

Be it remembered, that on the 19th day of April, 1895, there was duly filed in the Circuit Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,
Complainant,

vs.

LEE HOFFMAN,
Defendant.

Bill^{of} Complaint

To the Honorable Judges of the Above-entitled Court:

John McMullen, a citizen of the State of California, brings this, his bill of complaint, against Lee Hoffman, a citizen of the State of Oregon, and humbly complaining shows unto your

- Honors that your orator is a citizen of the State of California and a resident of the city of San Francisco, in said State, and
- [7] that the defendant, Lee Hoffman, is a citizen of the State of Oregon, and a resident of the City of Portland, in said State; and your orator complains and alleges that prior to the sixth day of March, 1893, the city of Portland, a body corporate and existing by and under the laws of said State of Oregon, acting by and through its water committee, published advertisements inviting bids for the construction of a system of waterworks for said city, or for the construction of certain portions thereof, whereby water was to be brought from a certain stream called Bull Run in the Cascade Mountains to said city of Portland and there distributed for use; that before the time named in said advertisement within which bids were to be received for the construction of said waterworks, it was agreed by and between the defendant and your orator that they would jointly endeavor to obtain the contract for the same, or some part thereof, and that in their joint interest a bid should be put in for the construction of said waterworks, or for the construction of certain portions thereof, and that in case they were successful they would share equally in such contract as resulted from their bid; that pursuant to said agreement between the defendant and your orator, and in their joint interest, a bid was put in by the defendant in the firm name of Hoffman & Bates, under which name the defendant was engaged in business, for the manufacture and laying of steel pipe from the head works of said system to Mount Tabor, which bid was found to be the lowest bid for said work, and the defendant was declared to be the successful bidder and entitled to a contract with the city of Portland therefor; and thereupon, in evidence of the interests had by the defendant and your orator in said bid, and the contract with the water committee to be entered into thereon and the work to be done thereunder, on said sixth day of March, the defendant and your orator entered into a certain written agreement under their hands and seals that they would share equally in such contract as should be entered into between the defendant and the city of Portland touching the work covered by said bid, each of them, the defendant and your orator, to furnish and
- [8]

pay one-half of the expenses of executing said contract, and each to receive one-half of the profits, or bear and pay one-half the losses which should result therefrom, and further, that in case either party to said contract should get a contract for doing, or should do, any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses of said contract or work should be shared and borne by the defendant and your orator equally.

That after the execution of said contract, to-wit, on the tenth day of March, 1893, the defendant, acting in the firm name of Hoffman & Bates, and for the joint interest of himself and your orator, entered into a certain written agreement with said city of Portland, acting by and through its water committee, based upon the bid which had been made for the work above mentioned, and being the same as that referred to in the contract between the defendant and your orator above mentioned, wherein and whereby the defendant undertook and promised to furnish all the labor and material requisite, according to certain specifications annexed to said contract and made a part thereof, for the pipe line of the system of water works from the head works at Bull Run creek to Mount Tabor, and to do and complete the manufacture of the steel pipe and other things mentioned in said specifications, to build and erect the necessary trestles, to dig the necessary ditches, to lay and cover said pipe and place it in a suitable and proper condition for operation, as contemplated by and provided in said specifications, to do all and each of the things stipulated in and required by said specifications, and to turn over all of the completed work to the city of Portland free from all liens or charges whatsoever. In consideration of the faithful performance of said contract by the defendant, the city of Portland promised to pay him therefor divers sums of money for different classes of material and labor furnished, aggregating four hundred and sixty-five thousand six hundred and sixty-seven dollars, but it was further stipulated in said contract that the city of Portland should have the right at any time during the progress of the work, and upon due notice to the defendant, to make necessary modification of the plans, specifications and locations,

and in such cases the payment to the defendant should be increased or reduced in proportion to the increase or reduction of expenses resulting from any such modification, and that payment was to be made only for work actually performed. It was further provided in the specifications attached to the said contract that the defendant should keep the conduit pipe in thorough repair, and guarantee the city against all loss, cost, or damages from breaks or leaks for a period of six months after the water should have been running under full pressure through the whole length of the conduit, and that during such [10] period he should be responsible for all damages from leaks and breaks, and made the necessary repairs at his own cost and expense, and that if he did not do so the city might make such repairs at the defendant's expense, and deduct the costs thereof from the moneys withheld. Payments were to be made upon monthly estimates of the work done to be delivered by the engineer of the water committee to the defendant, on the tenth day of each month, ninety per cent of the estimate to be paid on the twentieth day of the succeeding month, and the balance within twenty days after the due completion of the work and its acceptance by said water committee.

Your orator further shows that upon the execution of said contract the defendant and your orator proceeded with the performance of the work therein contemplated, and on or about the first day of January, 1895, completed the same and made delivery thereof to the city of Portland, which received and accepted the same, subject to the obligations imposed by said contract as to the maintenance of said conduit pipe, repairs on the same and damages from leaks and breaks, for six months after the date of such acceptance, and the city of Portland on said day turned water under full pressure into the whole length of the conduit pipe and has ever since been so running it; that towards the execution of said work your orator contributed valuable services of himself personally and of his own employees and agents in the State of California and elsewhere than in the State of Oregon, and contributed money and property for equipment in the prosecution of said work to [11] the amount of value of \$2,414.46, or thereabouts, and your orator has at all times been ready and willing to render, and has

rendered, any or all services in the conduct or management of the business of said partnership which have been requested by the defendant, and has been ready and willing to render any other service which might have been required or desired of him towards the prosecution of said work; that the defendant also contributed his personal services and advanced moneys and supplied equipment for the prosecution of said work, but the exact amount of such advances and the value of such services and equipment your orator does not know and cannot state; that your orator and the defendant did other work for bringing Bull Run water to Portland in connection with and supplementary to the work done under the contract between the defendant and the city of Portland, and for the work done under said contract the defendant has been paid by the City of Portland the stipulated amount of ninety per cent of the contract price, the other ten per cent being withheld until compliance is made with the guaranty in said contract contained as to keeping the line of pipe in repair and saving the city harmless from damages by leaks or breaks for six months from the date of the completion of the contract, and your orator is informed and believes, and therefore alleges the truth to be, that the defendant has been paid in large part, if not wholly, the cost and value of the other work performed for such water committee and above mentioned.

Your orator further alleges that he is informed and believes that various modifications were made by the city of Portland [2] in the plans, specifications and locations of said work, some increasing and some diminishing the contract price, but just what such modifications were and the extent of increase or diminution of the contract price resulting therefrom your orator does not know.

Your orator further shows to the court that at the time of the execution of the contract between your orator and the defendant above mentioned it was understood and agreed that within the State of Oregon the defendant was to have and exercise personal superintendence of the work contemplated to be done under said contract, was to make all purchases, hire all labor, and generally to manage all matters connected with the execution of said work, to draw and receive from the City

of Portland all moneys to be paid for said work, and to disburse the same for account of said work as might be required; that the defendant did assume and exercise personal superintendence of said work, and did make all purchases, except a certain hydraulic punch and shears purchased by your orator, employ all labor and exercise general management within the State of Oregon over all matters connected with the execution of said work, and received all moneys paid by the city of Portland on account of said work, and disbursed the same as far as there was occasion for disbursements, and, as your orator is informed and believes, and therefore alleges, of all the work done, material purchased, labor employed, expenses incurred and moneys paid out by the defendant he kept and now has full records and books of account; but that your orator during all the time of the prosecution of said work was a resident of the city of San Francisco, and with the exception of occasional visits to the city of Portland and with the exception of occasional visits to the city of Portland and casual inspections of the work as it progressed had no oversight of the work as it was done, and kept no book of account or record touching the same, and he alleges that he has now no knowledge or information touching the amount or character of the work performed outside of that provided for in the contract between the defendant and the city of Portland, or the value thereof, nor the character, amount or cost of materials purchased for said work, nor the amount or cost of labor therefor, nor the moneys paid to the defendant by the city of Portland for the work done under said contract, as well as that done in addition thereto, nor disbursements of such moneys made by the defendant on account of said work, but that all said matters and things are fully set forth in and shown by the records and books of account touching said work kept by the defendant; that your orator is informed and believes, and therefore alleges, that the defendant now has in his possession the several monthly estimates rendered him by the engineer of said water committee, and that the last of said estimates will show all the money earned and paid on said contract and other work done to bring Bull Run water to the city of Portland.

Your orator further alleges that on or about the 4th day of December, 1894, at the city of Portland, he requested the de-

fendant to allow him to inspect said records and books of account, and demanded of the defendant an accounting of the
1] dealings and transactions of said partnership, but that notwithstanding his contract with the defendant touching said work and his rights as a partner therein, the defendant then refused, and has ever since refused, to render to your orator any account thereof or to allow him to inspect the records of books of account kept by the defendant touching said work, or any monthly estimate rendered the defendant by the engineer of the water committee, and notwithstanding the truth is, as your orator believes, that the moneys already paid to the defendant by the city of Portland exceed by thirty-five thousand dollars, or more, all expenditures and liabilities which the defendant has made or incurred on account of his contract with said water committee and the work done thereunder, so that the same is profit on the contract, and notwithstanding the fact, as your orator believes and alleges, that of the moneys paid to the defendant by the water committee there is a large sum, the exact amount of which is to your orator unknown, due and owing, and which ought to be now paid to your orator under his contract with the defendant, over and above all claim which the defendant may have or make thereon, the defendant has appropriated and converted all of said moneys to his own use, and has refused, and still refuses, to render your orator any account or payment thereof, though your orator has requested the same, and the defendant did on said 4th day of December deny, and still denies, the rights of your orator as a partner in said work, and his right to an equal share in the profits thereof. That to the best of your orator's knowledge, information and belief the profit made by the defendant and your orator upon the
5] work done for the city of Portland is eighty thousand dollars, or more, of which one-half belongs and should be paid to your orator. That the assets of said partnership, in addition to said sum of thirty-five thousand dollars, or more, and ten per cent of the contract price of said work still retained and unpaid by the city of Portland, consist of certain plant, tools and other personal property in the State of Oregon, which are, according to the information and belief of your orator, of the value of five thousand dollars, or thereabouts.

Forasmuch, therefore, as the defendant has denied to your orator all his rights as a partner in the contract entered into between them as above set forth and the work done thereunder, as well as the other work done for the city of Portland, and has refused to give to your orator any information touching said contract or said work, or to allow your orator to have access to the books or records having reference to said work, and is withholding from your orator moneys paid to him by the city of Portland, and which should be now paid over to your orator under the contract between him and the defendant above set forth, it is necessary that there should be a dissolution of the co-partnership existing between the defendant and your orator in regard to said work, and inasmuch as some portion of said work is yet to be done, it is necessary that a receiver should be appointed to take charge of and to execute and complete the same under the orders and direction of this Court, so as to earn and be entitled to receive the moneys now withheld by the city of Portland on account of the work done under the contract between the defendant and said city, and to draw and receive from said city the moneys now withheld, and [16] hold and disburse the same under the orders of this Court, in order that the affairs of the partnership may be fully administered and wound up, and loss may be averted from both the defendant and your orator.

To the end, therefore, that the defendant may, if he can, show why your orator should not have the relief hereby sought, your orator prays that he may be required to make full, true, direct and particular answer and discovery to all and singular the allegations and matters set forth in this bill of complaint, but not under oath, an answer under oath being expressly waived; and that a receiver may be appointed to take charge of the records, books, papers and all other the goods and effects of said partnership, and to preserve and dispose of the same under the direction of this Court, and also to take charge of and perform all the uncompleted work under said contract with the city of Portland aforesaid, to-wit, the keeping of the conduit pipe, mentioned in said contract, in repair for so much of the period of six months from the acceptance of the work by said water committee as may yet have to run, and to do

every act and thing necessary to earn and be entitled to receive from said city of Portland, the ten per cent of the contract price of said work still unpaid, and that said receiver thereupon be authorized and directed to draw and receive from said city by and through said water committee all moneys owing from said city in respect of the work done under said contract, and as well any and all other moneys owing from said city for work done outside of said contract in order to bring Bull Run water to said city, and that he may make sale of all tools, equipment and other personal property belonging to the partnership and used in said work, and hold the proceeds thereof, and all other moneys coming into his hands, subject to the final disposition of this Court; that the defendant may be required to deposit and leave with said receiver during the pendency of this suit all books of account, papers and records he may have in his possession, withholding none of them, in anywise bearing upon said work, or the moneys paid or owing for the same, said books, papers and records to be at all seasonable times open to the inspection of your orator, his agents and legal counsel, with leave to take copies of the same; that the defendant may be enjoined and restrained during the pendency of this suit from making sale or other disposition of the tools, equipment or other personal property belonging to said partnership, and from drawing from the city of Portland the moneys by it withheld on account of the contract entered into between the defendant and the city and the work done thereunder, as well as any moneys which may be owing for other work done to bring Bull Run water to the city of Portland, or any portion of any such moneys, and that he may in like manner be enjoined and restrained from making any transfer or assignment or other disposition of said moneys, or any portion thereof, or of any claim or right he may have therein; that an account may be taken and stated between the defendant and your orator of the dealings and transactions of the partnership, and after making to the defendant due allowance for such services as he has rendered and property or money he has advanced for the work performed by himself and your orator as above set forth, and making to your orator due allowance for such services as
8] he has rendered and property or money he has advanced for

said work, the amount of profit realized on said work and the amount owing to your orator on account thereof may be ascertained and determined, and paid over to him, and that thereupon the partnership existing between the defendant and your orator may be dissolved; and that your orator may recover from the defendant his costs of suit, and may have such further or other relief as may be in keeping with equity and good conscience.

And may it please your Honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said Lee Hoffman, defendant, commanding him on a day certain to appear and make answer to this bill of complaint, and to stand to, abide by and perform such order and decree in the premises as may be made.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

L. B. COX,
Of Counsel.

State of California, }
County of San Francisco. } ss.

On this 18th day of March, 1895, before me personally appeared John McMullen, the complainant above named, who, being by me duly sworn, on his oath deposes and says that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

JOHN McMULLEN.

Subscribed and sworn to before me this 18th day of March, 1895.

[Seal]

JAMES L. KING.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed April 19, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 19th day of April, 1895, there was issued out of said Court a subpoena ad respondendum, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY.

JOHN McMULLEN,	} No. 2204.
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	

Subpœna ad Respondendum.

The President of the United States of America, to Lee Hoffman, Greeting:

- [20] You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the courtroom thereof, in the city of Portland, in said District, on the first Monday of June next, which will be the third day of June, A. D. 1895, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein John McMullen is complainant, and you are defendant, and further to do and receive what our said Circuit Court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our writ of subpoena, and to have then and there the same.

Hereof fail not.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 19th day of April, in the year

of our Lord, one thousand eight hundred and ninety-five, and of the Independence of the United States, the one hundred and

[Seal]

J. A. SLADEN,
Clerk.

By G. H. Marsh,
Deputy Clerk.

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

[21] The defendant is to enter his appearance in the above-entitled suit in the office of the Clerk of said Court on or before the day at which the above writ is returnable otherwise the complainant's bill therein may be taken pro confesso.

Return of Civil Process.

United States of America, }
District of Oregon. } ss.

I hereby certify that on the 19th day of April, 1895, at Portland, Or., in said district, I duly served the within subpoena ad respondendum upon the therein named Lee Hoffman, by delivering to him personally a true copy of said subpoena, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within entitled cause duly certified to by L. B. Cox, attorney for plaintiff.

H. C. GRADY,
United States Marshal.
By L. C. Driggs, Deputy.

[Endorsed]: Returned and filed April 19, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 19th day of April, 1895, there was duly filed in said court an affidavit of L. B. Cox, attorney for the complainant, in words and figures as follows, to-wit:

22] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Complainant,

vs.

LEE HOFFMAN,

Defendant.

Affidavit of L. B. Cox.

United States of America, }
District of Oregon. } ss.

L. B. Cox, being duly sworn, deposes and says that he is attorney for the above-named complainant and makes this affidavit on his behalf, for the reason that said complainant is not within the District of Oregon; that the attached paper marked "A" is a copy of the contract mentioned in the complaint upon which this suit is based, which contract is now in the custody of the affiant.

L. B. COX.

Subscribed and sworn to before me this 19th day of April, 1895.

[Seal]

J. A. SLADEN,

Clerk.

By G. H. Marsh, Deputy.

"A."

[23] This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expects to enter into a contract with the water committee of the city of Port-

land for doing such work, the contract having been awarded to said Hoffman and Bates on said bid:

It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom.

And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike.

Witness our hands and seals this 6th day of March A. D. 1893.

(Signed)

JOHN McMULLEN. [Seal]

(Signed)

LEE HOFFMAN. [Seal]

In presence of:

P. L. Willis. (Signed.)

R. E. Sewall. (Signed.)

[Endorsed]: Filed April 19, 1895. J. A. Sladen, Clerk.

[24]

Return of Service of Affidavit of L. B. Cox.

United States of America, }
District of Oregon. } ss.

I hereby certify that on the 19th day of April, 1895, at Portland, Oregon, in said District, I duly served the within affidavit of L. B. Cox, upon the therein-named Lee Hoffman, by delivering to him, personally, a true copy of said affidavit duly certified to by L. B. Cox, attorney for the plaintiff in the within entitled cause.

H. C. GRADY,
United States Marshal.
By L. C. Driggs, Deputy.

And afterwards, to wit, on the 19th day of April, 1895, there was duly filed in said court a motion for a restraining order, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,	}
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	

Motion for Restraining Order.

To the Honorable Judges of the above-entitled court.

Comes now the complainant by counsel and based upon the
 5] verified bill of complainant and the affidavit of L. B. Cox, solicitor for the complainant filed herein, moves your Honors for an order enjoining the defendant during the pendency of this suit from the commission of the acts set forth in the bill, and that a further order may be made appointing a receiver in accordance with the allegations and prayer of the bill; and that pending such action as may be taken hereon a restraining order may issue against the defendant as prayed for in the bill.

COX, COTTON, TEAL & MINOR,
 Solicitors for Complainant.

[Endorsed]: Filed April 19, 1895. J. A. Sladen, Clerk.

Return of Service of Motion.

United States of America,	}	ss.
District of Oregon.		

I hereby certify that on the 19th day of April, 1895, at Portland, Or., in said District, I duly served the within motion for an enjoining order upon the therein named, Lee Hoffman, by delivering to him, personally, a true copy of said motion, duly certified to by L. B. Cox, attorney for the plaintiff.

H. C. GRADY,
 United States Marshal.
 By L. C. Driggs, Deputy.

And afterwards, to wit, on the 19th day of April, 1896, there was issued out of said court a restraining order, in words and figures as follows to wit:

[26] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN	}	No. 2204.
Complainant,		
vs.		
LEE HOFFMAN,		
Defendant.	}	

Order to Show Cause and Restraining Order]

Upon reading and filing the bill in the above-entitled cause, and hearing Mr. L. B. Cox, of counsel for the complainant, it is ordered, that the above-named defendant do appear before this court at the United States courtroom, in Portland, in said District, on the tenth day after service upon said defendant of a copy of a bill of complainant filed herein and of this order, if it be a court day, or else on the court day next following, at 11 o'clock, A. M., of said day, then and there to show cause, if any, why a provisional injunction should not issue and a receiver be appointed herein according to the prayer of the bill in that behalf.

And it is further ordered that upon the complainant giving to the defendant a bond, with sureties, in the sum of five thousand dollars, to be approved by the clerk of this court, conditioned to pay the said defendant whatever damages and losses, [27] not exceeding the sum of five thousand dollars, he may sustain by reason of this order, if the same be wrongful or without sufficient cause; in the meantime and until the further order of the court herein, the said defendant, his agents and servants be, and they hereby are, severally restrained from doing any of the acts complained of in said bill.

Dated April 19, 1895.

CHARLES B. BELLINGER,
Judge.

Return of Civil Process.

United States of America, }
 District of Oregon. } ss.

I hereby certify that on the 19th day of April, 1895, at Portland, Or., in said District, I duly served the within restraining order upon the therein named Lee Hoffman, by delivering to him, personally, a true copy of said order duly certified to by J. A. Sladen, clerk of the U. S. Circuit Court.

H. C. GRADY,
 United States Marshal,
 By L. C. Driggs, Deputy.

[Endorsed]: Filed April 19, 1895. J. A. Sladen, Clerk.

And afterwards, to wit, on the 19th day of April, 1895, there was duly filed in said court, a bond on restraining order, in words and figures as follows to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,	}
Complainant,	
vs.	
LEE HOFFMAN,	}
Defendant.	

Bond on Restraining Order.

Know All Men by These Presents:

That we, John McMullen, as principal, and J. F. Watson and H. F. McElroy, as sureties, are held and firmly bound unto Lee Hoffman, the above-named defendant, in the sum of five thousand dollars, to be paid to the said defendant, for the payment of which well and truly to be made we bind ourselves, our

heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated April 19, 1895.

Whereas, the above-named complainant has begun a suit in said court against the above-named defendant, and has applied to said court for a restraining order commanding and enjoining the said defendant to desist and refrain from the commission of certain acts in the bill complained of:

Now, therefore, the condition of this obligation is such, that if the above-named complainant shall answer and pay all damages and losses that the said defendant may sustain by reason [29] of said restraining order, if the same be wrongful or without sufficient cause, then this obligation is to be null and void, otherwise to remain in full force and virtue.

JOHN McMULLEN, [L. S.]

By L. B. Cox, his Attorney.

J. F. WATSON. [L. S.]

H. F. McELROY. [L. S.]

Signed, sealed and delivered in presence of, to signatures Watson & McElroy.

Geo. W. Hoyt.

Chas. O. Davis.

United States of America, }
District of Oregon. } ss.

I, J. F. Watson, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and freeholder within said District, and that I am worth, in property situated therein, the sum of five thousand dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

J. F. WATSON.

Subscribed and sworn to before me this April 19, 1895.

[Seal]

R. W. HOYT,

Notary Public for Oregon.

0] United States of America, }
 District of Oregon. } ss.

I, H. F. McElroy, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and freeholder within said District, and that I am worth, in property situated therein, the sum of five thousand dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

H. F. McElroy.

Subscribed and sworn to before me this April 19, 1895.

[Seal]

R. W. HOYT,

Notary Public for Oregon.

The above bond approved April 19, 1895.

J. A. SLADEN,

Clerk United States Circuit Court, District of Oregon.

[Endorsed]: Filed April 19, 1895. J. A. Sladen, Clerk.

And afterwards, to wit, on the 6th day of May, 1895, there was duly filed in said court, an affidavit of Lee Hoffman, defendant, in words and figures as follows, to wit:

1] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,
 Complainant, }

vs.

LEE HOFFMAN,
 Defendant. }

Affidavit of Lee Hoffman.

State of Oregon, }
 Multnomah County. } ss.

I, Lee Hoffman, defendant in the above-entitled suit, being first duly sworn, on oath according to law, do say:

That I signed the original writing, a copy of which, as I be-

lieve, is annexed to the affidavit of L. B. Cox, filed herein, but that no contract of partnership was thereby or in any manner entered into or in any manner formed between the complainant in said bill and this affiant, for that long before and at the time of the signing of said writing between the parties a combination had been formed and existed between the defendant and complainant for the purpose of preventing and defeating any competition in bidding for said work and the furnishing of the material necessary for the proper execution and performance of said contract, should it be awarded to either of said parties, whereby it was agreed by and between [32] them that the defendant should bid for the privilege of doing the work and furnishing the material mentioned in the bill of complaint under and in the name of Hoffman & Bates, and the complainant should bid in and under the name of the San Francisco Bridge Company, and that both the complainant and the defendant should and did know the amount of each one's bid at and before the same was filed with the Portland water committee, and that the figures in said bid should be so arranged as to afford one or the other of said parties a favorable chance of being awarded said contract. That pursuant to said agreement and combination between said parties said bids were made and filed, and that the bid put in by the complainant in the name of the San Francisco Bridge Company was raised and increased at the request and on the demand of the defendant about \$115,000, and that under said agreement between said parties about that sum and amount was added to complainant's bid, and thereby the said water committee was compelled to pay more for said material and work than they otherwise would have been required to pay, and as a part of the same agreement between said parties it was further agreed and understood by and between them that in the event the bid of either of said parties made as aforesaid should be accepted by the said water committee of the city of Portland, they, the complainant and the defendant, would share the net profits arising from the performance thereof between them. That the writing, a copy of which is annexed to Mr. Cox's affidavit as Exhibit "A," was made in furtherance of and to carry into effect said combination and agreement, and for no other purpose, as soon as the contract was awarded to Hoffman & Bates [33] by said water committee, and that by reason of said combina-

tion aforesaid between said parties, the price of said work and material was largely increased, and that by reason of said increase the contract was awarded to Hoffman & Bates at an advance of about \$45,000 more than would otherwise have been necessary for said water committee to pay; and further deponent saith not.

LEE HOFFMAN.

Subscribed and sworn to before me this 6th day of May, 1895.

[Seal]

E. E. MALLORY,
Notary Public for Oregon.

[Endorsed]: Filed May 6, 1895 J. A. Sladen, Clerk.

And afterwards, to-wit, on the 7th day of May, 1895, there was duly filed in said court an affidavit of John McMullen, complainant, in words and figures as follows, to-wit:

[34] *In the Circuit Court of the United States for the District of Oregon;*

JOHN McMULLEN,	}
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	}

Affidavit of John McMullen.

State of Oregon, }
Multnomah County. } ss.

I, John McMullen, being first duly sworn, say I have read the affidavit of the defendant filed herein. I deny all manner of combination or confederation with the defendant in regard to bidding for the work or material involved in this suit which had for its purpose or effect the prevention or defeat of com-

petition in bidding for said work or material, or of doing any wrong or injury to the city of Portland or its water committee, as charged in said affidavit, or otherwise. I deny that it was agreed between the defendant and myself that the defendant should put in one bid for the work and material mentioned in the bill of complaint and that I should put in another bid for said work and material, or either thereof, in the name of the San Francisco Bridge company, or otherwise, or that the figures of said bids should be so arranged as to afford one or the other of us a favorable chance of being awarded said contract, or that any other agreement was made than as is hereinafter and in the bill of complaint set forth: I admit that a bid was put in by me in the name of the San Francisco Bridge Company for said work and material, but I deny that it was put in pursuant to the alleged combination or agreement between the defendant and myself, or any combination or agreement, and I deny that said bid was raised at the request or demand of the defendant, or at all, in the sum of \$115,000, or any sum. I deny that by reason of said bid, or anything connected therewith, said water committee was compelled to pay, or did pay, more for said work or material than it otherwise would have been required to pay. I deny that as a part of said alleged agreement it was further, or at all, agreed between the defendant and myself, except as hereinafter and in said bill of complaint stated, that in the event that the bid of either the defendant or myself should be accepted by said water committee, we would share the net profits arising from said contract. I deny that the writing attached to the affidavit of L. B. Cox, filed herein and marked Exhibit "A" was made in furtherance of or to carry into effect the alleged combination or agreement as soon as the contract was awarded to Hoffman & Bates by said water committee, or at all, or was made for any other purpose than as hereinafter set forth. I deny that by reason of said alleged, or any, combination between the defendant and myself the price of said work or material was largely, or at all, increased, or that by reason of said alleged increase the contract was awarded to Hoffman & Bates at an advance of [36] about \$45,000, or any sum, more than would otherwise have been necessary for said water committee to pay.

For further answer to said affidavit, and for a full and true statement of the relations and connection existing between

the defendant and myself with regard to the matters set forth in the bill of complaint, I say that in or about the year 1887 the city of Portland advertised for bids for the construction of a system of water works, and the San Francisco Bridge Company, a corporation of which I was then and have ever since been the principal stockholder and general manager, was the successful bidder for a portion of such work; that contracts were not let, for the reason that the city failed to raise money for the work, but that seeing the success which had attended the bid of the San Francisco Bridge Company the defendant then or soon thereafter stated to me that when said work should be revived and other bids received for contracts for said work he desired to join me in submitting bids and to take a joint interest in such contracts as might be awarded upon them. That in the latter part of the year 1892 it became known that the city of Portland proposed to advertise for other bids for such work and thereupon the defendant and myself opened negotiations for entering a joint bid or bids for said work, or for portions of it; that owing to the magnitude of the work, it involving over \$1,000,000 in all, and my nonresidence I did not desire to bid for it alone, and on account of the magnitude of the work the defendant represented to me that he did not wish to bid alone, and thereupon it was generally understood and agreed that we would act jointly in submitting bids which should be for our joint benefit. That the water [37] committee of the city of Portland did advertise for sealed bids for a water system to bring water from Bull Run creek to the city of Portland, said bids to be submitted on or before the day of February, 1893; that a few days before said date I came to the city of Portland, for the purpose of counseling and acting with the defendant in the matter of submitting bids, and it was thereupon verbally agreed between us that we would submit bids for a number of the lots of work and material offered by said water committee, the defendant in the name of Hoffman & Bates, under which name he was engaged in business, and I in the name of the San Francisco Bridge Company; that in pursuance of said agreement I put in bids on six proposals connected with said system of water works, using the name of the San Francisco Bridge Company, and the de-

fendant, in the name of Hoffman & Bates, put in bids on four proposals, but that none of said bids were successful except the one for furnishing the work and material mentioned in the bill of complaint. That upon said proposal both the defendant and myself bid and there were six other bidders, eight in all; that the bid tendered by the defendant, \$465,667, was the lowest offered and was accepted and a contract awarded thereon, since performed by the defendant and myself, as is set forth in the bill of complaint. I further say that the amount of said bid was fixed and determined by myself, I insisting upon the bid the defendant proposed offering being reduced \$20,000 in amount, by which action only was the contract secured. It is true that in the name of the San Francisco Bridge Company I also put in a bid on the same proposal for the sum of [38] \$514,664, but said bid was put in well knowing that it would not be accepted, and I would in no event have put in a larger bid than defendant's if his had not been submitted; the next lowest bid was \$477,552, and by my joining in the defendant's bid and reducing it as above set forth there was saved to the city of Portland the sum of \$11,885. That I had not determined upon or fixed the amount I was willing to bid for said work and material at any time prior to agreeing with the defendant upon the amount specified in the defendant's bid, which was on the evening of the day preceding the letting of said work and materials; that the bid tendered by me in the name of the San Francisco Bridge Company was only tendered because other bidders knew I had come to Portland for the purpose of attending the letting and I put in a bid for appearance sake, the amount of which was fixed at haphazard after said agreement respecting the amount of defendant's bid. I further say that I did nothing in connection with said letting in conjunction with the defendant or otherwise, nor did the defendant, or any person on our behalf to my knowledge do anything to stifle or affect competition in the bidding for said work or materials; my sole aim was to obtain an award of the contract for said work and materials upon the joint bid of the defendant and myself made in the name of said defendant for the sum of \$465,667.

JOHN McMULLEN.

Subscribed and sworn to before me this 7th day of May, 1895.

[Seal]

J. M. LONG,
Notary Public for Oregon.

[Endorsed]: Filed May 7, 1895. J. A. Sladen, Clerk.

[39] And afterwards, to wit, on the 3d day of June, 1895, there was duly filed in said court, an answer, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

Complainant,

LEE HOFFMAN,

Defendant.

Answer to Bill of Complaint.

[40] The defendant, Lee Hoffman, answering the complainant's bill of complaint herein, admits that the complainant is a citizen of the State of California and a resident of the city of San Francisco in said state, and that the defendant, Lee Hoffman, is a citizen of the State of Oregon, and a resident of the city of Portland, in said State; and the defendant admits that prior to the 6th day of March, 1893, the city of Portland, a body corporate and existing by and under the laws of the State of Oregon, acting by and through its water committee, published advertisements inviting bids for the construction of a system of waterworks for said city or for construction of portions thereof, whereby water was to be brought from a certain stream called Bull Run, in the Cascade Mountains, to said city of Portland, and there distributed for use. And the defendant admits that before the time named in said advertisement within which bids were to be received for the construction of said waterworks, it was agreed by and between the defendant and

the complainant that they would endeavor to obtain the contract for the same or some part thereof; but denies they at any time agreed that they would jointly endeavor to obtain a contract for the same or some part thereof, but on the contrary it was agreed at said time between the complainant and this defendant that they should not act jointly in said matter, but severally, the defendant acting in the name of Hoffman & Bates and the complainant acting in the name of the San Francisco Bridge Company, a corporation organized and existing under the laws of the State of California. The defendant denies that it was agreed between complainant and the defendant that bids should be put in for the construction of said waterworks or for the construction of certain portions thereof, but on the contrary this defendant alleges the fact to be that it was mutually and secretly agreed by and between the complainant and the defendant before the bids hereafter mentioned were filed with the said water committee that the complainant should make and file with the said water committee several bids for portions of said work in the name of the said San Francisco Bridge Company, and the defendant should in like manner make and file several bids with said committee for the same portions of said work in the name of Hoffman & Bates, and that said bids should be made so as not to compete with each other, but so as to avoid it. That it was further agreed that for that purpose and to more surely effectuate the [41] object of getting a contract for said work at as high a figure as possible, and for the purpose of enhancing the profits of complainant and defendant, both the complainant and defendant before said bids were filed should examine the same and know the contents thereof, and that, pursuant to said understanding the complainant did submit to the defendant for his examination and approval the bids which he proposed to file with said committee for said work and the furnishing of material, and inlikemanner the defendant submitted to the complainant for his approval the bid which he proposed to file with said committee for said work and the furnishing of material, and the defendant disapproved of the complainant's bid, and required that the same be raised about (\$98,000) ninety-eight thousand dollars above and more than complainant proposed and intended and was about to bid for said work, which was

done, and the complainant disapproved of the defendant's bid, and required that the same be reduced about \$13,000 below what the defendant proposed and intended to bid for said work and the furnishing of material named in said bid, which was also done, and the said bids containing the new amounts secretly agreed upon by said parties were then filed with said water committee, and complainant and defendant mutually agreed to share the profits and losses in the execution and performance of said contract, and this defendant, for greater certainty, asks to refer to each and all of said bids upon the trial of this cause. And the defendant alleges that for the purpose of enhancing the profits of complainant and defendant it was further secretly agreed and understood by and between the complainant and the defendant at said time, and [42] that they so secretly combined and acted together for the purpose of apparently competing for said work and the furnishing of said material, but in fact not to do so, and for the purpose of advancing the price of said work and materials to the city of Portland over and above what it would otherwise have been required to pay for the same work and materials and of getting the contract at such advanced figures, all of which were in fact accomplished by the acceptance by the said water committee of the bid made by Hoffman & Bates.

Defendant further avers and alleges that in inviting bids for said work and materials the same was divided by said committee into distinct classes, and bidders were required to submit to said committee bids stating the amount for which they would perform the particular part of the work indicated in said bid. That in preparing bids for the materials and work afterward awarded to the defendant as hereinbefore stated complainant and defendant agreed and combined together to obtain the highest possible price from the city for the same, and so arranged their respective bids for the various kinds of work and materials required as that they should not operate as competing bids, although appearing to said committee to be so. The defendant bid in the name of Hoffman and Bates upon manufacturing and laying said pipe \$465,667, on furnishing steel plates for pipes \$359,278.80, on bridges, \$33,562.94, on headworks \$17,800. The complainant bid in the name of the San Francisco Bridge Company on manufacturing and laying

said pipe \$514,664, on steel plates for pipes \$348,781, on bridges \$31,279.07, on headworks \$16,550. The said several items of [43] said bids were arranged as stated by and between complainant and defendant, and it was understood and agreed between the same parties and a part of the scheme upon which bidding was carried on, and that in case the bid of Hoffman & Bates for manufacturing and laying the pipe should be the lowest and should be accepted by the city, and in case the bid of the San Francisco Bridge Company for furnishing the steel plates for the pipes should be the lowest bid and should be accepted by the said city, and the bid for the same work by Hoffman & Bates should be the next lowest, said complainant would decline to accept said work, and by that means induce the city to accept the higher bid of the defendant, and the same course was to be pursued with all other portions of said work upon which both of said parties bid.

And the defendant alleges that it was one of the conditions of bidding prescribed by said water committee that each bid, before the same would be considered, must be accompanied by a certified check for an amount equal to five per centum of the amount of said bid, and that both complainant and defendant accompanied each of their respective bids by a certified check equal to five per centum of the amount thereof.

And the said defendant alleges that as soon as the bid of Hoffman & Bates was accepted by the said water committee, and for the purpose of carrying into effect the said contract and understanding previously and then existing between the complainant and the defendant, on the 6th day of March, 1893, and the complainant and the defendant agreed in writing under their hands and seals to the effect that whereas the said Hoff- [44] man & Bates have with the assistance of the said McMullen, the complainant, at the recent bidding on the manufacturing and laying steel pipe from Mt. Taber to the head works of the Bull Run water system for Portland submitted the lowest bid for said work, and expects to enter into contract with said water committee of the city of Portland for doing such work, the contract having been awarded to Hoffman & Bates on said bid: It is thereby agreed in and by said writing, amongst other things, that said Hoffman, the defendant, and said McMullen, the complainant, shall and will share in said contract (with

the said water committee of the city of Portland) equally, each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom, which written contract the defendant asks to refer to upon the trial of this cause for greater certainty. And so the defendant alleges the fact to be that each of the bids so made as aforesaid by the complainant in the name of the San Francisco Bridge Company and by the defendant in the name of Hoffman & Bates was in the joint interests of complainant and defendant, but denies that one single bid was made in their joint interests.

This defendant further answering said bill of complaint admits that pursuant to said alleged agreement between defendant and complainant, and in their joint interests, a bid was put in by the defendant in the name of Hoffman & Bates, under which name the defendant was engaged in business for the manufacture and laying of steel pipes from the head works of said system to Mt. Tabor, which bid was found to be the lowest [45] bid for said work, which is the bid of Hoffman and Bates above referred to, and admits the defendant was declared to be the successful bidder and entitled to a contract with the city of Portland therefor. And the said defendant admits that thereupon, in evidence of the alleged interests had by the defendant and the complainant in the said bid and the contract with the water committee to be entered into thereon and the work to be done thereunder on the said 6th day of March, defendant and the complainant entered into a certain written agreement under their hands and seals that they would share equally in such contract as should be entered into between the defendant and the city of Portland touching the work covered by said bid, each of them, the defendant and the complainant to furnish and pay one-half of the expense of executing said contract, and each to receive one-half of the profits or bear and pay one-half of the losses which should result therefrom, and further that in case either party to said contract should get a contract for doing or should do any other part of the work let or to be let by the said committee for bringing Bull Run water into Portland, the profits and losses of said contract or work should be shared and borne by the complainant and the defendant equally. But this defendant avers that the said contract

last referred to is the same contract referred to in a former part of this answer, and was a part of and made to aid in carrying out the unlawful combination and confederacy entered into between complainant and defendant hereinbefore more particularly and concisely stated and alleged, to which statement this defendant asks leave to particularly refer upon the trial.

- [46] And the defendant further answering the complainant's bill of complaint admits that after the execution of the said contract, to wit, on the 10th day of March, 1893, the defendant, acting in the firm name of Hoffman & Bates, and in the joint interest of himself and complainant, entered into a certain written agreement with said city of Portland, acting by and through its water committee, based upon the bid which had been made for the work above in the said bill of complaint and in this answer mentioned, and being the same as that referred to in the contract between the defendant and the complainant above-mentioned, wherein and whereby the defendant undertook and promised to furnish all the labor and material requisite according to certain specifications annexed to said contract, and made a part thereof, for the pipe line of the system of waterworks from the head works at Bull Run creek to Mount Tabor, and to do and complete the manufacture of steel pipe and other things mentioned in said specifications, to build and erect the necessary trestles, to dig the necessary ditches, to lay and cover the said pipe and place it in a suitable and proper condition for operation, as contemplated by and provided in said specifications; to do all and each of the things stipulated in and required by the said specifications, and to turn over all of the completed work to the city of Portland free from all liens or charges whatsoever. Admits that in consideration of the faithful performance of the said contract by the defendant the city of Portland promised to pay him therefor divers sums of money for different classes of material and labor furnished, aggregating four hundred and sixty-five thousand six hundred and sixty-seven dollars, and admits that it
- [47] was further stipulated in said contract that the city of Portland should have the right at any time during the progress of the work and upon due notice to defendant to make necessary modifications of the plans, specifications, and locations, and in

such cases the payment to the defendant should be increased or reduced in proportion to the increase or reduction of expenses resulting from such modification, and that payment was to be made only for work actually performed. Admits that it was further provided in the specifications attached to the said contract that the defendant should keep the conduit pipe in thorough repair, and guaranty the city against all losses, costs, or damages from breaks or leaks for a period of six months after the water should have been running under full pressure through the whole length of the conduit, and that during such period he should be responsible for all damages from leaks and breaks, and make the necessary repairs at his own cost and expense, and that if he did not do so the city might make such repairs at the defendant's expense, and deduct the costs thereof from the money withheld.

Admits that the payments were to be made only on monthly estimates of the work done to be delivered by the engineer of the water committee to the defendant on the 10th day of each month, 90 per cent of the estimate to be paid on the 20th day of the succeeding month, and the balance within twenty days after the due completion of the work and its acceptance by said water committee.

Denies that upon the execution of the said contract the defendant and the complainant proceeded with the performance of the work therein contemplated, or on or about the first day of January, 1895, or at any other time, completed the same, or any part thereof, or made delivery thereof to the city of Portland; but, on the contrary, this defendant alleges that he alone proceeded with said work and completed the same at the time stated, and turned the same over to the city of Portland, but admits that the same was accepted by the city of Portland subject to the obligations imposed by the said contract as to the maintenance of said conduit pipe, repairs on the same, and damages for leaks and breaks for six months after the date of said acceptance, and admits that the city of Portland on said day turned water under full pressure into the whole length of the conduit pipe and has ever since been so running it.

Further answering said bill of complaint the defendant denies that towards the execution of the said work the complainant contributed valuable or any services for himself, per-

sonally or otherwise, or of his own employees or agents, or any or either of them, in the state of California or elsewhere than in the State of Oregon, or in the State of Oregon or elsewhere, or contributed money or property or anything else for equipment in the prosecution of said work or otherwise to the amount or value of \$2,414.46 or thereabouts or any other sum or amount, and denies that the complainant has at all or any times been ready and willing to render, or has rendered, any or all services, or any services, whatever in the conduct or management of the business of alleged partnership which have been requested by defendant, or has been ready or willing to render any other service which might have been required or desired [49] of him towards the prosecution of said work. But, on the contrary, the defendant alleges the fact to be that as soon as the written agreement between the complainant and defendant was signed the complainant left the State of Oregon, and thereafter neglected, failed, and refused to render any aid or to assist the defendant in any way whatever in carrying out said contract with the city of Portland. That in the first place the defendant was required to give to the city of Portland a bond with sureties for a very large amount, to wit, \$140,000, for the due performance of said work, and the defendant requested the complainant to furnish a portion of the sureties on said bond, but the complainant refused to do so or to aid the defendant in any manner to procure said sureties. This defendant further avers that a large amount of money was necessary to be raised from time to time in the performance of said contract with said water committee for the purpose of purchasing material and supplies and the payment for the laborers necessarily employed in and about said work, and that the defendant was without the necessary means or resources to procure the same; that he continued to apprise the complainant from time to time up to about the 16th day of September, 1893, of his circumstances and condition financially, and requested the complaint to furnish one-half of the money actually necessary to the successful prosecution of the said work and the performance of said contract, but the defendant positively declined and refused to furnish any money whatever to aid in the prosecution of said work or the performance of said contract, claiming he had no money to put

[40] into the business. That by reason of said failure and refusal of said complainant to perform his part of the said alleged agreement of copartnership the said defendant, on or about the 16th of September, 1893, dissolved the same, and notified the complainant of such dissolution and the termination of said alleged agreement, and the said complainant thereafter assented to said dissolution, and that thereby the said supposed copartnership was dissolved and terminated.

Defendant further avers and alleges that complainant not only refused to furnish any surety in the bond required under the bid of Hoffman & Bates accepted by the city water committee to insure the performance of the contract by the bidder, and required and compelled the defendant to furnish the said bond and all the sureties thereon, and refused to furnish his proportionate share of the money required and necessary to carry on the work under said contract, and to pay the bills for labor and materials as they fell due, but complained of defendant that he would not and did not refuse to pay supply and other necessary bills of expenses incurred in carrying on said work, and recommended that instead of paying such bills the defendant should stand the creditors off, declared that defendant was very foolish to try to meet every payment promptly, said "He would stand them off for everything, or pay them 50 per cent, or whatever he could out of the estimates, and such things as supplies for camps he would not pay for six months if he did not feel like it," although the defendant had been obliged in securing supplies and labor to contract for paying [51] the same at the end of each month, as complainant well knew, yet the complainant refusing to put in his share of the money to pay these bills as aforesaid desired the defendant to disregard his contract and stand off his creditors as aforesaid. And defendant further avers and alleges that said complainant being desirous of securing other portions of the work for bringing Bull Run water to the city of Portland, and particularly that portion thereof relating to the manufacture and laying of submerged pipe for conveying water across the Willamette river, proposed in writing to defendant that they devise some means to secure the said work as against any competing bidders, and proposed to defendant that for the purpose of defeating or preventing competition for

bids for said work they "pool" the bids, and recommended to defendant that to do this they would have to let the secretary of the water committee, Frank T. Dodge, in and arrange with him so that in case any bids came without personal representatives to have him not receive them until after the letting, and then return them unopened and that said complainant and defendant would gather in everybody that is personally represented, and assuring defendant there will not be many, complainant further notified defendant that one Riffle, a bidder likely to be a competitor for said submerged pipe work, had applied to McNeal's agent here for bids on the cast iron, but assuring defendant that complainant can control McNeal's man, who, complainant informed defendant, wants to go with us, meaning complainant and defendant. Complainant also notified defendant that he, defendant, should see Smith & Watson, and see that they do not form a combination with anyone [52] else to bid on this work, but advised defendant to take them in by giving them the cast iron, and further assuring defendant of complainant's confidence that defendant can get Dodge into "our," complainant's and defendant's, camp. That McNeal, referred to by complaint, at the time of making of said proposition to defendant by complainant was engaged in the business of a cast-iron pipe founder, and was likely to become a bidder for the contract of furnishing and laying said submerged pipe, and the Smith & Watson referred to by complaint is Smith Brothers & Watson, manufacturers of iron pipe in the city of Portland, and who were likely to be competitors for the contract of furnishing and laying said submerged pipe.

Defendant further avers and alleges that on the 16th day of September, 1893, he had already advanced and expended of his own funds in carrying on said work under said contract with the city of Portland, \$15,990. That bills for said work to fall due on the 25th day of September, 1893, amounted to about \$22,500. That on the 11th day of September, 1893, defendant was notified by the said committee that it was without funds with which to pay the estimates for the completed work for the month of August, and had no assurance when money for that purpose could be obtained. That in order to be prepared to meet the payments so to fall due on the 25th day of September, defendant on his own account, by furnish-

ing his own collaterals, secured at considerable loss and sacrifice, \$14,000, which would not have been necessary or required if complainant had not refused to provide the money he promised and agreed to furnish.

That the said plant purchased by defendant at Seattle, by [3] request of complainant, was purchased from the San Francisco Bridge Company, and bills therefor were rendered by said company to Hoffman & Bates, as well as for the said hydraulic punch and shears in said bill of complaint mentioned, and that said Hoffman & Bates forwarded and tendered to said San Francisco Bridge Company, San Francisco, Cal., full and complete payment of the several sums and amounts claimed in said bills. That said San Francisco Bridge Company refused to accept the money so tendered. That said defendant has at all times since said bills were rendered been ready, able, and willing, and is now ready, able, and willing, to pay for said materials, punch and shears in full.

Denies that the defendant and the complainant did other work for bringing Bull Run water to Portland in connection with or supplementary to the work done under the contract between the defendant and the city of Portland. The defendant admits that for the work done under the said contract the defendant has been paid by the city of Portland the stipulated amount of ninety per centum of the contract price, as claimed by said committee for Portland, and the other ten per centum as claimed by said committee is withheld until compliance is made with the guaranty in said contract as to keeping the line of pipe in repair and saving the city harmless from damages by leaks or breaks for six months from the date of the completion of the said contract.

The defendant admits that he has been paid a large part of the cost and value of the other work performed for said water committee, but not wholly paid.

The defendant admits that various modifications were made [4] by the city of Portland in the plans, specifications, and locations of said work, some increasing and some diminishing the contract price, and admits just what such modifications were, and the extent of the increase or diminution of the contract price resulting therefrom the complainant does not know.

And the defendant admits that at the time of the execution of the alleged contract between the complainant and the defendant it was understood and agreed that within the State of Oregon the defendant was to have and exercise personal superintendence of the work contemplated to be done under said alleged contract, was to make all purchases, hire all labor and generally to manage all matters connected with the execution of the said work, to draw and receive from the city of Portland all moneys to be paid for said work, and to disburse the same for account of said work as might be required.

And the defendant alleges it was also further agreed at the same time between said parties that for said services to be rendered by the defendant he was to have and receive and to be paid out of the money to be drawn from the said water committee a reasonable compensation for his services, and that one thousand dollars per month is such reasonable compensation.

The defendant admits that he did assume and exercise personal superintendence of said work, and did make all purchases, except a certain hydraulic punch and shears, but denies that complainant purchased same, and avers that defendant ordered the same, which were paid for by the San Francisco Bridge Company.

[55] Admits that defendant did employ all labor and exercise general management within the State of Oregon over all matters connected with the execution of said work, and received all moneys paid by the city of Portland on account of said work, and disbursed the same as far as there was occasion for disbursement; and the defendant admits that of all the work done, material purchased, labor employed, expenses incurred and moneys paid out by the defendant he kept and now has full records and books of account.

The defendant admits that during all of the time of the prosecution of the said work the complainant was a resident of the city of San Francisco, and with the exception of occasional visits to the city of Portland and casual inspections of the work as it progressed, had no oversight of the work as it was done; but as to whether he kept no book of account or record touching the same the defendant does not know, and can neither affirm or deny the same, and leaves the complainant to make such proof of such statement as he may be able upon

the trial. The defendant says that as to whether the complainant has no knowledge or information touching the amount or character of the work performed outside of that provided for in the contract between the defendant and the city of Portland, or the value thereof or the character, amount, or cost of materials purchased for said work, or the amount or cost of labor therefor or the moneys paid to the defendant by the city of Portland for the work done under said contract, as well as that done in addition thereto, or the disbursements of such moneys made by the defendant on account of said work [56] and therefor can neither affirm or deny the same, but leaves the complainant to make such proof thereof and as to all of said matters upon the trial as he may desire or be able to offer.

But the defendant admits that all of said matters and things are fully set forth in and shown by the records and books of account touching said work kept by the defendant, as this defendant now believes.

The defendant admits that he now has in his possession the several monthly estimates rendered him by the engineer of said water committee, and denies that the last of said estimates will or does show all the money earned or paid on said contract or other work done to bring Bull Run water to the said city of Portland.

The defendant admits that on or about the 4th day of December, 1894, at the city of Portland, the complainant requested the defendant to allow him to inspect said records and books of account, and demanded of defendant an accounting of the dealings and transactions of said alleged partnership, and admits that notwithstanding said alleged contract with the defendant touching said work and his pretended rights as an alleged partner therein, the defendant then refused, and has ever since refused, to render to the complainant any account thereof, or to allow him to inspect the records or books of account kept by the defendant touching said work or any monthly estimate rendered the defendant by the engineer of the water committee. But the defendant alleges that he refused to allow such examination as he then and still believes he might lawfully, properly, and justly do for the causes and reasons hereinbefore in this answer more particularly stated.

[57] This defendant admits that the moneys already paid to him by the city of Portland exceed by \$35,000 or more all expenditures or liabilities which the defendant has made or incurred on account of his contract with said water committee or the work done thereunder and admits the same is expected profit on the contract.

This defendant denies that of the moneys paid to this defendant by the water committee there is a large or any sum under complainant's alleged contract with the defendant due or owing, or which ought to be now or at any time paid to the complainant under his said alleged contract with the defendant over or above all claim which the defendant may have to make thereon. And the defendant denies that he has converted all or any of said moneys to his own use, but he admits that he has refused, and still refuses, to render to the complainant any account or payment thereof, and admits that complainant has requested the same, and admits that on said fourth day of December the defendant did deny and still denies the assumed and alleged rights of the complainant as a partner in said work and his alleged rights to an equal or any share of the profits thereof.

This defendant denies that the profit made by the defendant and the complainant upon the work done for the city of Portland was \$80,000 or more, or any other sum, and denies that said complainant did any work for the said city of Portland, and alleges that from the time said bid of Hoffman & Bates was accepted by the Portland water committee the complainant refused to aid in any manner in said work otherwise than to request defendant to go up on the Sound for a small remnant of a plant then owned by the San Francisco Bridge [58] Company for worth of no greater value than about \$1,062.82; and denies that one-half said sum of \$80,000, or any part thereof, belongs or should be paid to the complainant.

Denies that the assets of said alleged partnership, in addition to said sum of \$35,000 or more, or any sum of ten per centum of the contract price of said work still retained and unpaid by the city of Portland, consists of certain plant, tools, or other personal property in the State of Oregon or elsewhere, and denies that the same is of the value of \$5,000.00 or any sum.

Defendant admits he has on hand a part of the plant with which he did the work for the water committee, but alleges the same is pretty well worn out and of little value, but what its value is he cannot state, for the reason he does not know.

And this defendant having now made full, true, direct, and particular answer and discovery to all and singular allegations and matters set forth in complainant's said bill of complaint, and having stated why the complainant should not have the relief therein sought, now denies that any receiver ought to be appointed to take charge of the records, books, paper, and all other goods or effects of said pretended partnership, or to preserve or dispose of the same under the direction of this Court or otherwise, or to take charge of or perform all or any of the uncompleted work under said contract with the said city of Portland, namely, the keeping of the said conduit pipe mentioned in said contract in repair for so much of the period of six months from the acceptance of said work by said water committee as it may yet have to run, or to do any or every act or thing necessary to earn or to be entitled to [59] receive from said city of Portland the ten per centum of the contract price of said work still unpaid.

And this defendant denies that the said complainant is entitled to or ought to have the relief demanded in said bill of complaint, or any part thereof, or to have any accounting or an injunction or a receiver herein.

And the said defendant having now made full answer to the said bill of complaint herein prays to be discharged with his costs and disbursements.

LEE HOFFMAN.

DOLPH, MALLORY, SIMON & STRAHAN,

Solicitors for Defendant.

State of Oregon, }
Multnomah County. } ss.

On this 29th day of May, 1895, before me personally appeared the defendant, Lee Hoffman, herein, who, being by me duly sworn, on his oath deposes and says that he has heard the foregoing answer read and knows the contents thereof, and

Julia E. Hoffman, Executrix, etc.

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that same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

LEE HOFFMAN.

Subscribed and sworn to before me this 29th day of May, 1895.

[Seal]

E. E. MALLORY,
Notary Public for Oregon.

Due service of the within answer by certified copy as provided by law is hereby admitted at Portland, Or., June 3, 1895.

COX, COTTON, TEAL & MINOR,

Of Solicitors for ———

[Endorsed]: Filed June 3, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Tuesday, the 11th day of June, 1895, the same being the 56th judicial day of the regular April term of said court. Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon

JOHN McMULLEN. }

vs.

LEE HOFFMAN, }

No. 2204.

Order Vacating Restraining Order, etc.

June 11, 1895.

This cause was heard upon the order requiring the defendants to show cause why a provisional injunction should not [61] issue herein, and upon the application of the plaintiff for the appointment of a receiver herein, and was argued by Mr. L. B. Cox, of counsel for said plaintiff, and by Mr. Joseph Simon and Mr. R. S. Strahan, of counsel for said defendant: On consideration whereof, it is ordered and adjudged that said provi-

sional injunction and said application for the appointment of a receiver be, and the same are hereby, denied, and that the restraining order heretofore entered herein be, and the same is hereby, vacated, set aside, and discharged.

And afterwards, to-wit, on the 11th day of June, 1895, there was duly filed in said court, a motion for an order modifying order denying application for restraining order, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,	Complainant. } vs. } LEE HOFFMAN, } Defendant. }

Petition for Modification of Order.

To the Honorable Judges of the Above-entitled Court.

62] Comes now the above-named complainant by counsel and respectfully moves the Court to modify the order this day made in the above-entitled cause denying the application of complainant for the appointment of a receiver herein and denying the application for a provisional injunction restraining the defendant from the commission of the acts in the bill of complaint set forth, and discharging the restraining order heretofore allowed by the Court herein, restraining the defendant from the commission of such acts.

Now, the complainant prays your Honors to so modify the said order that a provisional injunction may issue against the defendant in this cause restraining him during the pendency of this suit from drawing from the city of Portland, Oregon, or the water committee of said city, the money owing by said city on the contract made by it with said defendant for work in bringing the Bull Run water to the city of Portland, perform-

ed by the defendant and the complainant, and other work done by the defendant and complainant in connection with the principal work covered by said contract, as said matters are set forth in the bill of complaint, and in like manner enjoining and restraining the defendant from making any transfer or other disposition of said money, or any portion thereof, or of any claim or right he may have therein, during the pendency of this suit, and that the restraining order heretofore allowed by the Court herein may be continued in force to the extent of enjoining the defendant from the commission of such acts until this matter may be fully heard and determined.

COX, COTTON, TEAL & MINOR,
Attorneys for Complainant.

[63] United States of America. } ss
District of Oregon. }

Return of Civil Process.

I hereby certify that on the 11th day of June, 1895, at Portland, Or., in said District, I duly served the within petition for modification of order upon the therein named Lee Hoffman, and by delivering to him, personally, a true copy of said petition duly certified to by L. B. Cox, of attorneys for plaintiff.

H. C. GRADY,
United States Marshal.
By I. Geo. Humphrey,
Deputy.

[Endorsed]: Filed June 11, 1895. J. A. Sladen, Clerk.

And afterward, to-wit, on Tuesday, the 11th day of June, 1895, the same being the 56th judicial day of the regular April term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge., presiding—the following proceedings were had in said case, to-wit:

[64] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,	Complainant,	}
vs.		
LEE HOFFMAN,	Defendant.	

Order to Show Cause, etc.

It having this day been ordered by the Court that the petition of the above-named complainant for the appointment of a receiver herein, and for the allowance of a provisional injunction restraining the defendant from the commission of certain acts set forth in the bill of complaint be denied, and that the restraining order heretofore allowed by the Court, whereby the defendant was enjoined from commission of said acts, be discharged, and the complainant having now filed in court an application praying that said order may be modified to the extent of allowing a provisional injunction against the defendant enjoining and restraining him during the pendency of this suit from drawing from the city of Portland, Oregon, or the water committee of said city, the moneys held by said city and owing upon the contract between the defendant and said city, as is set forth in the bill of complainant and also [65] certain moneys owing from said city for other work alleged in the bill of complainant to have been performed by the complainant and the defendant in connection with the work covered by said contract, and having been performed for the purpose of bringing Bull Run water to the city of Portland, Oregon, and from making any transfer, assignment, or other disposition of said moneys, or any part thereof:

On reading the said application and hearing, Mr. L. B. Cox, of counsel, it is ordered that the defendant show cause, if any he have, on the 17th day of June, 1895, at the opening hour of court, or as soon thereafter as counsel can be heard, why the prayer of said application should not be granted and pending such hearing it is ordered that the restraining order heretofore allowed in this cause be revived and continued to the extent of

enjoining and restraining the defendant until the further order of the Court from drawing from the city of Portland, or its water committee, any of the moneys above mentioned, and from making any transfer, assignment, or other disposition of said moneys, or any portion thereof, or any claim or right he may have therein.

And it is further ordered that the bond heretofore given by the complainant upon the allowance of said restraining order be continued in full force and effect until the hearing and determination of the application of the complainant above mentioned.

Dated this 11th day of June, 1895.

CHARLES B. BELLINGER,

Judge.

[Endorsed]: Filed June 11, 1895. J. A. Sladen, Clerk.

United States of America, }
[66] District of Oregon. } ss.

I hereby certify that on the 11th day of June, 1895, at Portland, Oregon, in said District, I duly served the within order to show cause upon the therein-named Lee Hoffman, by delivering to him, personally, a true copy of said order, duly certified to by the clerk of the Circuit Court for said District.

H. C. GRADY,

United States Marshal.

By Geo. Humphrey,

Deputy.

And afterwards, to-wit, on the 13th day of June, 1895, there was duly filed in said court exceptions to the answer, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,	}
Complainant.	
vs.	
LEE HOFFMAN,	
Defendant.	}

Exceptions to Answer for Impertinence.

[67] Exceptions for impertinence and scandal taken by the above-named complainant to the answer of the defendant filed herein:

The above-named complainant, John McMullen, files these, his exceptions to the subjoined passages of the answer of the defendant, Lee Hoffman, to-wit:

1. To all that portion of the answer commencing with the words "but on," on the seventh line of the second page, to and inclusive of the words "avoid it," in the sixteenth line of said page.

2. To all that portion of the answer commencing with the words "that it," in the sixteenth line of the second page, to and inclusive of the words "this cause," in the eleventh line of the third page.

3. To all that portion of the answer commencing with the words "And the," in the eleventh line of the third page, to and inclusive of the words "Hoffman & Bates," in the twenty-second line of said page.

4. To all that portion of the answer commencing with the words, "that in," in the twenty-seventh line of the third page, to and inclusive of the words "be so," in the fourth line of the fourth page.

5. To all that portion of the answer commencing with the words "on furnishing," in the fifth line of the fourth page, to and inclusive of the figures "\$17,800." in the seventh line of said page.

6. To all that portion of the answer commencing with the words "The complainant," in the seventh line of the fourth page, to and inclusive of the figures "\$16,550," in the tenth line of said page.

[68] 7. To all that portion of the answer commencing with the words "The said," in the tenth line of the fourth page, to and inclusive of the words "parties bid," in the twenty-second and twenty-third lines of said page.

8. To all that portion of the answer commencing with the words "And the," in the twenty-fourth line of the fourth page, to and inclusive of the words "amount thereof," in the thirtieth line of said page.

9. To all that portion of the answer commencing with the words "And the," in the first line of the fifth page, to and inclusive of the words "greater certainty," in the twenty-first line of said page.

10. To all that portion of the answer commencing with the words "And so," in the twenty-second line of the fifth page to and inclusive of the words "joint interests," in the twenty-sixth line of said page.

11. To all that portion of the answer commencing with the words "and was," in the twenty-fifth line of the sixth page, to and inclusive of the words "the trial," in the twenty-ninth line of said page.

12. To all that portion of the answer commencing with the words "Defendant further," in the twenty-second line of the tenth page, to and inclusive of the words "as aforesaid," in the thirteenth line of the eleventh page.

13. To all that portion of the answer commencing with the words "And defendant," in the thirteenth line of the eleventh page, to and inclusive of the words "submerged pipe," in the ninth line of the twelfth page.

[69] 14. To all that portion of the answer commencing with the words "Defendant further," in the line between lines nine and ten of the twelfth page, to and inclusive of the words "to furnish," in line sixteen of said page.

15. To all that portion of the answer commencing with the words "That the," in the line between lines sixteen and seventeen of page twelve, to and inclusive of the words "complaint mentioned," in the line between lines eighteen and nineteen of said page.

16. To all that portion of the answer commencing with the words "and that," in the line between lines eighteen and nine-

teen of the twelfth page, to and inclusive of the words "in full," in the twenty-second line of said page.

17. To all that portion of the answer commencing with the words "and denies," in the third line of the seventeenth page, to and inclusive of the figures "\$1,062.82," in the ninth line of said page.

And for ground of exception the complainant says that the matter contained in all the passages above set forth is impertinent; and complainant further excepts to the matter contained in all the passages of the answer above referred to in the paragraphs of exceptions numbered 1, 2, 3, 4, 7, 11, 12, 13, as scandalous, and alleges that it is so; and complainant prays that all such impertinent and scandalous matter may be expunged from said answer.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

L. B. COX, of Counsel.

[70] Service by copy admitted at Portland, Oregon, June 12, 1895.
DOLPH, MALLORY, SIMON & STRAHAN,
Attorneys for Defendant.

[Endorsed]: Filed June 13, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Monday, the 17th day of June, 1895, the same being the 59th judicial day of the regular April term of said court—Present, the Honorable Charles B. Bel-linger, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,)	
vs.	)	No. 2204.
LEE HOFFMAN,)	

Order.

June 17, 1895.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for the plaintiff, it is ordered, that the hearing of this cause, upon

[71] the motion to modify the restraining order heretofore issued in this cause, and upon the exceptions to the answer herein, be, and the same is, hereby, set for Monday, July 1, 1895.

And afterwards, to-wit, on Saturday, the 29th day of June, 1895, the same being the 70th judicial day of the regular April term of said court—Present, the Honorable Charles B. Bellinger, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon

JOHN McMULLEN,	}	No. 2204.
vs.		
LEE HOFFMAN,		

Order.

June 29, 1895.

Now, at this day, comes Mr. L. B. Cox, of counsel for plaintiff herein, and moves the court for a continuance of the hearing of this cause upon the exceptions to the answer herein, beyond the date heretofore set for said hearing, to wit, on Wednesday, July 3, 1895, whereupon, it is ordered, that said motion be, and the same is, hereby, denied.

[72] And afterwards, to-wit, on the 1st day of July, 1895, there was duly filed in said court, exceptions to the answer, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,	}	
Complainant,		
vs.		
LEE HOFFMAN,	}	
Defendant.		

Exceptions to Answer for Insufficiency.

Exceptions taken by the above-named complainant to the answer of the defendant for insufficiency.

The above-named complainant excepts to the answer of the defendant filed herein for insufficiency in the passages herein-after set forth, and thereabout shows to the court that it is charged in the bill that prior to the sixth day of March, 1893, the complainant and defendant, acting together, had submitted a bid through the defendant for doing certain work for the city of Portland, Oregon, in bringing water to said city from a certain stream called Bull Run, which bid had been accepted by said city, and the defendant, by whom said bid was offered, on behalf of himself and the complainant, was declared to be entitled to the contract with the city of Portland for all such work. That thereafter, on said sixth [73] day of March, the defendant and the complainant entered into a certain written contract that they would share equally in such contract as should be entered into between the defendant and city of Portland touching said work, each to furnish one-half of the expense of executing the contract, and to receive one-half of the profits or pay one-half of the loss which should result therefrom; and further, that in case either party to said contract should get a contract for doing, or should do, any other part of the work let, or to be let, for the city of Portland for bringing water to said city, the profits and losses of said contract or work should be shared in the same manner. That a contract was entered into between the city of Portland, acting through its water committee, and the defendant for doing the work covered by the bid which had been submitted by the defendant in the interest of himself and the complainant, and said work was thereafter performed by the complainant and defendant, and certain other work in connection with bringing Bull Run water to Portland was also performed by the complainant and defendant. That a large amount of money had been earned by the complainant and defendant in doing such work, which money was in the hands of the defendant in part, and in part was owing by the city of Portland to the defendant, and that the defendant denied complainant's interest in said contract and work, and refused to account with him for the profit made thereon, but claimed the whole profit to be his own.

That for answer to such charge, as set forth in the bill, the defendant has, amongst other things, pleaded as follows, to wit:

- [74] "And the defendant further answering the complainant's bill of complaint admits that after the execution of the said contract to wit, on the 10th day of March, 1893, the defendant, acting in the firm name of Hoffman & Bates, and in the joint interest of himself and the complainant, entered into a certain written agreement with the said city of Portland, acting by and through its water committee, based upon the bid which had been made for the work above in the said bill of complaint and in this answer mentioned, and being the same as that referred to in the contract between the defendant and the complainant above mentioned, wherein and whereby the defendant undertook and promised to furnish all the labor and material requisite according to certain specifications annexed to the said contract, and made a part thereof, for the pipe line of the system of waterworks from the head works at Bull Run creek to Mount Tabor, and to do and complete the manufacture of steel pipe and other things mentioned in said specifications, to build and erect the necessary trestles, to dig the necessary ditches, to lay and cover the said pipe, and place it in a suitable and proper condition for operation as contemplated by and provided in said specifications; to do all and each of the things stipulated in and required by said specifications, and to turn over all of the completed work to the city of Portland free from all liens or charges whatsoever. Admits that in consideration of the faithful performance of the said contract by the defendant the city of Portland promised to pay him therefor divers sums of money for different classes of material and labor furnished, aggregating four hundred and sixty-five thousand six hundred and sixty-seven dollars, and admits that it was further stipulated in said contract that the city of Portland should have the right at any time during the progress of the work, and upon due notice to the defendant, to make necessary modifications of the plans, specifications, and locations, and in such cases the payment to the defendant should be increased or reduced in proportion to the increase or reduction of expenses resulting from any such modification, and that payment was to be made only for work actually performed. Admits that it was further provided in the specifications attached to the said contract that the defendant should keep the conduit pipe in thorough repair and guarantee the city against all loss,
- [75]

costs, or damages from breaks or leaks for a period of six months after the water should have been running under full pressure through the whole length of the conduit, and that during such period he should be responsible for all damages from leaks and breaks, and make the necessary repairs at his own cost and expense, and that if he did not do so the city might make such repairs at the defendant's expense, and deduct the costs thereof from the moneys withheld.

"Admits that the payments were to be made only on monthly estimates of the work done to be delivered by the engineer of the water committee to the defendant on the 10th day of each month. 90 per cent of the estimate to be paid on the 20th day of the succeeding month, and the balance within twenty days after the due completion of the work and its acceptance by said water committee.

[76] "Denies that upon the execution of the said contract the defendant and the complainant proceeded with the performance of the work therein contemplated, or on or about the first day of January, 1895, or at any other time, completed the same, or any part thereof, or made delivery thereof to the city of Portland; but, on the contrary, this defendant alleges that he alone proceeded with said work and completed the same at the time stated, and turned the same over to the city of Portland, but admits that the same was accepted by the city of Portland subject to the obligations imposed by the said contract as to the maintenance of said conduit pipe repairs on the same and damages for leaks and breaks for six months after the date of such acceptance, and admits the city of Portland on said day turned water under full pressure into the whole length of the conduit pipe, and has ever since been so running it.

"Further answering said bill of complaint the defendant denies that toward the execution of said work the complainant contributed valuable or any services of himself, personally or otherwise, or of his own employees or agents, or any or either of them, in the State of California or elsewhere than in the State of Oregon, or in the State of Oregon, or elsewhere, or contributed money or property or anything else for equipment in the prosecution of said work or otherwise to the amount or value of \$2,214.46, or thereabouts, or any other sum or

amount; and denies that the complainant has at all or any times been ready or willing to render, or has rendered, any or all services or any services whatever, in the conduct or management of the business of alleged partnership which have been requested by defendant, or has been ready [77] or willing to render any other service which might have been required or desired of him towards the prosecution of said work. But, on the contrary, the defendant alleges the fact to be that as soon as the written agreement between the complainant and defendant was signed the complainant left the State of Oregon, and thereafter neglected, failed, and refused to render any aid or to assist the defendant in any way whatever in carrying out said contract with the city of Portland. That in the first place the defendant was required to give to the city of Portland a bond with sureties for a very large amount, to-wit, \$140,000, for the due performance of said work, and the defendant requested the complainant to furnish a portion of the sureties on said bond, but the complainant refused to do so or to aid the defendant in any manner to procure said sureties. This defendant further avers that a large amount of money was necessary to be raised from time to time in the performance of said contract with said water committee for the purpose of purchasing material and supplies and the payment for the laborers necessarily employed in and about said work, and that the defendant was without the necessary means or resources to procure the same; that he continued to apprise the complainant from time to time up to about the 16th day of September, 1893, of his circumstances and condition financially, and requested the complainant to furnish one-half of the money actually necessary to the successful prosecution of the said work and the performance of said contract, but the defendant positively declined and refused to furnish any money whatever to aid in the prosecution of said work or the performance of said contract, claiming he [78] had no money to put into the business. That by reason of said failure and refusal of said complainant to perform his part of the said alleged agreement of co-partnership the said defendant, on or about the 16th day of September, 1893, dissolved the same, and notified the complainant of such dissolution and the termination of said alleged agreement, and the said com-

plainant thereafter assented to said dissolution, and that thereby the said supposed co-partnership was dissolved and terminated."

And the complainant respectfully submits to the court that he is advised by counsel that the said answer of defendant in the matters hereinabove set forth as a response to the charges of the bill of complaint above set forth, to-wit, all that portion of the answer as herein set forth commencing on the 38th line of the third page hereof to the end of the passage quoted from said answer, is evasive and insufficient, and ought to be amended, and he humbly prays that the same may be amended accordingly.

R. PERCY WRIGHT,
COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

[Endorsed]: Filed July 1, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Monday, the 1st day of July, 1895, the same being the 71st judicial day of the regular April term of said court—Present, the Honorable Charles B. Beltinger, United States District Judge, presiding—the following proceedings were had in said case, to wit:

[79] *In the Circuit Court of the United States for the District of Oregon*

JOHN McMULLEN.

vs.

No. 2,204.

LEE HOFFMAN,

Order.

July 1, 1895.

Now, at this day, comes the plaintiff herein, by Mr. L. B. Cox and Mr. H. Percy Wright, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, whereupon it is ordered that the hearing of this cause upon the exceptions to the answer of the defendant herein be, and the same is hereby, set for Wednesday, July 3, 1895.

And afterwards, to-wit, on Monday, the 26th day of August, 1895, the same being the 120th judicial day of the regular April term of said court—Present, the Honorable Charles B. Bel-linger, United States District Judge, presiding—the following proceedings were had in said case, to-wit

[80] *In the Circuit Court of the United States for the District of Oregon*

JOHN McMULLEN,	} No. 2,204.
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	}

Order on Exceptions to Dnsver.

August 26, 1895.

This cause came on to be heard before the Court on the 3d day of July, 1895, upon exceptions filed by the complainant to the answer of the defendant for impertinence and scandal, and also for insufficiency, and was argued by counsel, and the Court, not being advised as to what order should be made, took the same under consideration until this date, and now, being fully advised, it is ordered and adjudged that the 3d, 9th, 10th, and 13th, of said exceptions be, and the same are hereby, allowed, and that all other of said exceptions be, and the same are hereby, denied.

It is further ordered that this order be entered as of the 3d day of July, 1895, with like force and effect as though the same had been actually made and entered on said day, but that the complainant shall not be prejudiced in the matter of further
[81] appearing or pleading herein by reason of the entry being made as of said 3d day of July, 1895.

And afterwards, to-wit, on the 26th day of August, 1895, there was duly filed in said court, an opinion of the Court on exceptions to the answer, in words and figures as follows, to-wit:

JOHN McMULLEN, }
vs. } No. 2,204.
LEE HOFFMAN. }

Opinion on Exceptions to Answer.

August 26, 1895.

The questions in this case for decision arise upon exceptions to the answer of Hoffman.

The suit is upon a written contract between the parties, by which they agreed to share equally in a certain contract for the construction of the Bull Run pipe line entered into between the city of Portland and the defendant.

[82] The complaint alleges that prior to March 6, 1893, the city of Portland, through its water committee, invited bids for the construction of a system of waterworks; that before the time within which bids were to be received for such work it was agreed between complainant and defendant that they would jointly endeavor to obtain contract therefor and that in their joint interest a bid should be put in for the construction of said waterworks, and that in case they were successful they would share equally in such contract as resulted from such joint bid; that in pursuance of this agreement a bid was put in in the firm name of Hoffman & Bates, under which name the defendant was doing business, for the manufacture and laying of steel pipe from the head works of the water system to Mount Tabor, which bid was found to be the lowest bid made for such work; that the contract for which such bid was made was thereupon awarded to the defendant Hoffman; that thereupon, in evidence of their agreement, complainant and the defendant entered into a written agreement that they would share equally in the expenses, profits and losses of such contract as should be entered into between the city of Portland and Hoffman & Bates in respect to the work covered by the bid referred to; that thereafter the defendant, in the name of Hoffman & Bates entered into a contract with the city of Portland for the work in question, and the complainant and defendant proceeded with said work and completed the same about January 1st, 1895; that the complainant contributed valuable services by himself personally and by his employees and agents in California and elsewhere in such work, and con-

tributed money and property for equipment therein to the amount of \$2,414.46 or thereabouts, and has at all times been ready and willing to do anything necessary and required of him in that behalf; that the complainant and defendant did other work for bringing Bull Run water to Portland in connection with and supplementary to the work done under the contract mentioned; that at the time of the execution of the contract between parties hereto it was agreed that within the State of Oregon the defendant was to have superintendence of the work, manage all matters in connection therewith, and receive from the city all payments due on account of such construction contract, and that defendant so did act and manage and received payments from the city; that the defendant refuses to account to the complainant for the profits earned under said contract, which complainant believes to amount to \$80,000, or to allow complainant to inspect the records or books of account kept by defendant touching said work.

The defendant admits that before the time for receiving bids had elapsed it was agreed between the parties in the suit that they would endeavor to obtain the contract in question, but denies that it was agreed that they would act jointly to that end, but alleges that on the contrary it was agreed between them that they should not act jointly, but severally, defendant acting in the name of Hoffman & Bates and complainant acting in the name of the San Francisco Bridge Company; "that it was mutually and secretly agreed by and between the complainant and the defendant before the bids hereafter mentioned were filed with the said water committee that the complainant should make and file with the said water committee several bids for portions of said work in the name of the said San Francisco Bridge Company, and the defendant should in like manner make and file several bids with said committee for the same portions of said work in the name of Hoffman & Bates, and that bids should be made so as not to compete with each other but so as to avoid it. That it was further agreed that for that purpose and to more surely effectuate object of getting a contract for said work at as high a figure as possible, and for the purpose of enhancing the profits of complainant and defendant, both the complainant and defendant before said bids were filed should examine the same and know the contents thereof, and that pursuant to said understanding the com-

plainant did submit to the defendant for his examination and approval the bids which he proposed to file with said committee for said work and the furnishing of material, and in like manner the defendant submitted to the complainant for his approval the bid which he proposed to file with said committee for said work and the furnishing of material, and the defendant disapproved of the complainant's bid, and required that the same be raised about (\$98,000) ninety-eight thousand dollars above and more than complainant proposed and intended, and was about to bid for said work which was done, and the complainant disapproved of the defendant's bid and required that the same be reduced about \$13,000 below what the defendant proposed and intended to bid for said work and the furnishing of material named in said bid, which was also done, and the said bids containing the new amounts secretly agreed upon by said parties were then filed with said water committee, and complainant and defendant mutually agreed to share the profits and losses in the execution and performance of said contract, and this defendant for greater certainty asks to refer to each and all of said bids upon the trial of this cause."

* * * * *

[85] "That in preparing bids for the materials and work afterwards awarded to the defendant as hereinbefore stated, complainant and defendant agreed and combined together to obtain the highest possible price from the city for the same, and so arranged their respective bids for the various kinds of work and materials required as that they should not operate as competing bids, although appearing to said committee to be so."

The answer contains, among others, the following additional averments:

"Defendant further avers and alleges that complainant not only refused to furnish any surety in the bond required under the bid of Hoffman & Bates accepted by the city water committee to insure the performance of the contract by the bidder, and required and compelled the defendant to furnish the said bond and all the sureties thereon, and refused to furnish his proportionate share of the money required and necessary to carry on the work under said contract and to pay the bills for labor and materials as they fell due, but complained of

defendant that he would not and did not refuse to pay supply and other necessary bills of expenses incurred in carrying on said work, and recommended that instead of paying such bills the defendant should stand the creditors off, declared that defendant was very foolish to try to meet every payment promptly, said 'He would stand them off for everything, or pay them 50 per cent, or whatever he could out of the estimates, and such things as supplies for camps he would not pay for six months if he did not feel like it,' although the defendant had been obliged in securing supplies and labor to contract for [86] paying the same at the end of each month, as complainant well knew, yet the complainant refusing to put in his share of the money to pay these bills as aforesaid desired the defendant to disregard his contracts and stand off his creditors as aforesaid."

* * *

"Defendant further avers and alleges that on the 16th day of September, 1893, he had already advanced and expended of his own funds in carrying on said work under said contract with the city of Portland \$15,990. That bills for said work to fall due on the 25th day of September, 1893, amounted to about \$22,500. That on the 11th day of September, 1893, defendant was notified by the said committee that it was without funds with which to pay the estimates for the completed work for the month of August and had no assurance when money for that purpose could be obtained. That in order to be prepared to meet the payments so to fall due on the 25th day of September, defendant on his own account, by furnishing his own collaterals, secured at considerable loss and sacrifice \$14,000, which would not have been necessary or required if complainant had not refused to provide the money he promised and agreed to furnish.

"That the said plant purchased by defendant at Seattle, by request of complainant, was purchased from the San Francisco Bridge Company, and bills therefor were rendered by said company to Hoffman & Bates, as well as for the said hydraulic punch and shears in said bill of complaint mentioned, and that said Hoffman & Bates forwarded and tendered to said San Francisco Bridge Company, at San Francisco, Cal., full and [87] complete payment of the several sums and amounts claimed

in said bills. That said San Francisco Bridge Company refused to accept the money so tendered. That said defendant has at all times since said bills were rendered been ready, able and willing, and is now ready, able and willing, to pay for said material, punch and shears in full."

To these several portions of the answer the complainant excepts for impertinence, on the ground that the alleged fraud in procuring the construction contract from the city of Portland is not material in a suit for profits arising upon an independent contract between the parties for the construction of the work under the contract so procured. The case mainly relied upon by complainant is that of *Brooks v. Martin*, 2 Wall. 70. That was a case of partnership to buy soldiers' claims and land warrants issued therefor, to locate lands under such warrants and sell the same. Congress, to protect the soldier from his own improvidence, had enacted that any sale or contract going to affect the title or claim to any such bounty made prior to the issue of such warrant should be null and void to all intents and purposes whatsoever. Martin, the complainant in the suit, advanced all the money used in the enterprise, to the amount of \$50,000. He trusted the business entirely to the management of his two partners, who managed it at a distance of two thousand miles from Martin's home. The business was very profitable, of which fact Martin was kept in ignorance, and he was finally induced by various fraudulent expedients to sell his interests to his partners for what the Court refers to in its opinion as "substantially nothing." [88] His share in the profits at the time was \$30,000. Upon being advised of the fraud that had been practiced upon him he brought suit to cancel the sale of his interest and for an account and division of the profits. The court decided that after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms, the results of the contemplated operation completed, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract. The Court cites the case of *Sharp v. Taylor*, 2 Phillips Ch. 801, where the parties, who were British subjects, bought an American vessel, which had stranded off the port of Liverpool, res-

cued and repaired her, and put her in service between British and American ports. The ship was registered in the name of a citizen of the United States, to evade an act of Parliament which prohibited other than British ships to engage in such service under British ownership. One of the owners having refused to account to the other for profits earned, suit was brought and relief decreed. The Lord Chancellor said: "He," the complainant "is not seeking compensation and payment for an illegal voyage; that matter was disposed of when Taylor received the money, and the plaintiff is now only seeking payment for his share of the realized profits. The violation of law suggested was not any fraud upon the revenue, or omission to pay what might be due, but, at most, an invasion of a parliamentary provision, supposed to be beneficial to the ship-owners of this country; an evil, if any, which must remain the same whether the freight be divided between Sharp and [89] Taylor according to their shares or remain altogether in the hands of Taylor. As between these two, can this supposed evasion of the law be set up as a defense by one against the clear title of the other?"

In *Planter's Bank v. Union Bank*, 16 Wall, 483, it was held that an action would lie for the recovery of the proceeds of sale of confederate bonds, which had been sold by the defendant on the account of the plaintiff.

Assuming that a contract for the sale of such bonds was unlawful, the Court held that when the illegal transaction had been consummated and the proceeds of sale had been actually received and carried to the credit of the plaintiffs, such proceeds may be a legal consideration between the parties for a promise, express or implied."

The doctrine thus laid down is applied in *Burke v. Flood*, 1 Fed. R., 541; in *Telegraph Co. v. Railway Co.*, 3 Id., 423; in *Wann v. Kelly*, 5 Id., 584, and in *Buchanan v. Bank*, 55 Id., 223.

The first of these cases involved the Bonanza mine owners Flood, O'Brien, Mackey and Fair, and related to the manipulation of corporations controlled by them for the benefit of themselves as partners. The Court said: "I take it there can be no doubt that a partner is entitled to contribution from his co-partner when he has paid more than his share of the firm

liabilities, even though the liabilities grow out of a tortious act of the firm.

[90] When money has come into the hands of a partnership, on a partnership transaction, however wrongfully or unlawfully acquired as between the members, it is partnership assets, and must be accounted for as such between themselves." The case was not tried upon its merits, but was disposed of on a question of parties. It did not necessarily involve actual fraud or moral delinquency. As to this the opinion is as follows: "As now presented, no answer ever having been filed, the matter rests upon naked allegations upon information and belief. It is impossible to anticipate what may turn out in the proofs. It may possibly turn out in some legal aspects of the case, that defendants may be adjudged to account, whether rightfully or not, under circumstances disclosing no actual fraud, and no moral delinquency at all. In such a case a right to contribution would certainly arise in favor of the party who is called upon to pay more than his share, even though there is no partnership between them."

In the second case, *Telegraph Co. v. Railway Co.*, the question was raised as to the right to transfer a franchise to build and operate a telegraph line on the right of way of the railway company. The court held that even if it assumed "that the contract is void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the Court will not refuse to deal with that property on the ground that it was acquired under an illegal contract."

The case of *Wann v. Kelly* involved a stock gambling transaction. It is held that although the business was contrary to public policy and illegal, when the business was closed and one of the partners had received the profits, he was in duty bound to pay over to the other party his part of it.

[91] The case of *Buchanan v. Bank* was a case of partnership to pasture cattle in the Cherokee country, without contract with the Cherokee nation or authority of Congress. The partners borrowed \$25,000 to carry on this unauthorized business and gave their note for it. Upon maturity of this note they gave two others of \$12,500 each to pay the first, and upon suit being brought on one of these notes, defended on the ground that the first note provided means for an illegal transaction,

and was therefore for an illegal consideration, and that the second notes, given for the first, inherited its vice. This defense, it goes without saying failed.

The doctrine of these cases applies in all cases where recovery is sought on account of contracts that are forbidden by law, or, in case of corporation contracts, that are *ultra vires*. While such contracts will not be enforced, yet if they have been executed the party having their benefits must fulfill their own obligations in consequence of them. In none of the cases cited was there actual fraud or other moral delinquency. The profits derived from the purchase and location of soldiers' warrants in *Brooks v. Martin*, 2 Wall, 70, do not appear to have been at the expense or to the injury of the soldiers from whom the warrants were purchased. So far as appears such warrants may have been paid for at their full value and under circumstances that were advantageous to those selling them. The policy of the law forbade such dealing in order wholly to guard the soldiers from their own improvidence.

[92] So in the case of *Sharp v. Taylor*, the policy of the law prohibited British owners from using other than British ships in the particular trade in question. "The violation of law suggested in the case was not," said the Lord Chancellor, "any fraud upon the revenue, or omission to pay what might be due, but, at most, an invasion of a parliamentary provision supposed to be beneficial to ship owners of the country."

In none of the cases did the right to be enforced depend upon considerations that appeared to be immoral or wrong in themselves. While the statement in the opinion in *Burke v. Flood* that a partner is entitled to contribution where he has paid more than his share, even though the liability grows out of a tortious act of the firm, seems broad enough to authorize the conclusion that the profits of an immoral completed transaction may be recovered, yet there was no such question in the case, and the matter is freed from doubt both as to the facts of the case in this respect and the conclusion to be drawn from the opinion by the statement of the Court, that "it may possibly turn out in some legal aspects of the case, that defendant's may be adjudged to account, whether rightfully or not, under circumstances disclosing no actual fraud and no moral delinquency at all." "In such a case," says the court, "a right to contribution would certainly arise."

In *Watson v. Murray*, 23 N. J. Eq., the Court recognizes the distinction that exists between enforcing the execution of an agreement to do an illegal act and the distribution of the realized profits of the act, but held that the distinction is not to be regarded as of universal or general application, and that such distinction is excluded in cases of attempted apportionment of gains resulting from criminal practices by manifest considerations of example and influence—considerations not deemed to exist in the cases where the distinction has been allowed. These considerations necessarily exist in all cases of actual fraud or other moral delinquency. The judicial sanction given to fraudulent acts in the apportionment of the realized profits therefrom among the guilty parties, would be destructive of private and public morals. The profits of fraud belong in the same category with those of gambling and other immoral practices.

But whether or not there is a distinction between cases where the contract in question is intrinsically fraudulent and bad, and cases where its illegality is merely in the prohibition of the statute, the question upon which this case depends may be disposed of on the ground upon which it is placed by the plaintiff; namely, that where the illegal contract has been fully executed, a party is entitled to a remedy to recover his share of the profits arising from it.

In this case the profits sought to be recovered do not grow out of the contract in suit. The plaintiff was not a party to the contract for the construction of the city waterworks, and admittedly had no interest in that contract except such as he may be entitled to under the contract upon which suit is brought. There was no privity between him and the city water committee. On the contract he represented himself by his bid as against the bid of defendant, and as adverse to the interests of the defendant in the proposed contract. He assumed no obligation in the executed contract. The right which he asserts does not in any way depend upon that contract, to which he was not a party, and in which he was in no wise obligated. It is not, therefore, a case of an executed contract, legal or otherwise, under which complainant's rights in suit have arisen. The right claimed in this suit is under, not the executed contract between the defendant and the city of Portland to build the city pipe line, but the un-

executed agreement between the parties for a division of the profits of the contract. In all the cases cited by plaintiff the courts have refused to permit the defense of illegality of the contracts involved to avail, because such contracts were executed. The courts in granting relief were therefore not required to aid illegal transactions, but merely enforced rights which rested upon new and independent considerations. In *Brooks v. Martin* the contract had become executed. The illegal transaction was an accomplished fact, and would "not be in any manner affected" by what the Court was asked to do between the parties. In decreeing the relief prayed for in that case the Court did not in any manner aid the illegal business or further what the violated statute was intended to prevent. It did not enforce any provision of the illegal contract. It merely enforced the payment of money which had accrued in the hands of one of the parties to the benefit of the other as a result of the execution of the contract in question.

The contract under which the profits in this case were realized was not to do an illegal act. The case does not depend upon the city contract, but upon an alleged unlawful agreement for a division of the profits of such contract. The contract on which the profits were realized has been executed, but the express agreement by which these profits were to be ap-
[95] portioned—the agreement in suit—has not been executed; otherwise the occasion for this suit would not exist.

The case is within the principle adopted in *Meguire v. Corwine*, 101 U. S. 108. There was a contract by which one party was to procure the appointment of another as special counsel in certain cases against the United States and aid the appointee in the defense of such causes, in consideration of which he was to receive one-half of the fee paid by the government for the services rendered. The appointment was procured and the services rendered as stipulated, and the defendant received \$29,950 as a fee, but refused to account to plaintiff for any part of it. It was held that the plaintiff could not recover. The Court said: "The law touching contracts like the one here in question has been often considered by this Court, and is well settled by our adjudications. (*Marshall v. Railroad Co.*, 16 Howard, 314; *Tool Company v. Norris*, 2 Wall, 45; *Trist v. Child*, 21 Id., 441; *Coppell v. Hall*, 7 Id.,

542.) It cannot be necessary to go over the same ground again. To do so would be a waste of time. The object of this opinion is rather to vindicate the application of our former rulings to this record than to give them new supprt. They do not need it. Frauds of this class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare, and of free government as well. * * * The contract is clearly illegal, and this action was brought to enforce it."

6] In the case of *Trist v. Child*, cited above, the action was for a percentage of a claim collected from the government through the efforts of plaintiff as a lobbyist under an agreement by which he was to receive such percentage. Included in the contract there were services rendered "in drafting a petition setting forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, with other services of like character intended to reach only the understanding of the persons sought to be influenced." But because these meritorious services were "blended and confused" with those which were forbidden, the entire contract was held to be fatally affected, and relief was refused.

In *Buck v. Albee*, 62 Am. Dec. 564, the Court held that a contract connected with and growing immediately out of an illegal act would not be enforced; that whenever it is necessary for the plaintiff to prove such illegal contract in order to recover, no recovery can be had; otherwise if the right can be established without such proof.

The case of *Hannah v. Fife*, 27 Mich., 171, lays down a principle that is decisive of this case. This was a case where the party to whom a contract was awarded for the construction of a swamp land state road entered into a contract with his competitor, by which the latter took the contract upon terms somewhat more favorable for the public than the bid upon which the award was made, and agreed to pay the successful bidder eight sections of land as a bonus for the relinquishment of his bid. The law allowed two sections of land per mile of road as the maximum quantity for the work. Each of the two bids

- was for this amount. The bid, however, of the unsuccessful bidder, who subsequently took the contract by agreement as stated, was for a roadbed only sixteen feet wide, while the State requirements were for one twenty feet wide. The Court said that there was no evidence of a previous agreement between the parties except such inferences as may be drawn from the circumstances and the contracts made; and that it was "difficult to resist the conclusion that these things tend pretty strongly to show the existence of some such previous understanding" but the Court held that whether there was in fact any such secret understanding was immaterial; that, without such understanding, the tendency of all such contracts between bidders as that in existence in the case "must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder"; that it was "this tendency rather than the fact of actual fraud in the particular transaction which is generally recognized as rendering contracts void as against public policy," and that the contract sued upon must be held void upon this ground. The doctrine of the case, in short, is that secret agreements between bidders for their mutual profit, and to avoid competition with each other while keeping up the appearance of competition, and all agreements having that tendency, are void, and will not be enforced; nor will an agreement between different sets of bidders for a public contract, by which one agrees, in consideration of a sum of money to be paid by the other, to withdraw his bid and assist the latter to obtain the contract, be enforced. (Sharp v. Wright, 35 Bart., 236; Gulick v. Ward, 18 Am. Dec., 389.)

As has already been stated, any relief decreed the plaintiff requires the enforcement of the unexecuted provisions of the contract by which plaintiff was to share with the defendant the profits of the work on the contract awarded Hoffman in the name of Hoffman & Bates. What was that contract? Plaintiff insists that the Court cannot look beyond the written agreement set out in the complaint. The written contract is to share equally in the expenses and profits of any contract that should be entered into between the defendant

and the city on an award already made the defendant as the lowest bidder for such work. The complaint alleges an agreement between plaintiff and defendant anterior to the bid, by which in effect the plaintiff should have a joint interest with the defendant in the latter's bid, and that the written contract was in evidence of this agreement. The averments of the answer refer to this identical agreement and allege considerations embodied in it to show its illegal and fraudulent character. In other words, the answer impeaches the precise transaction alleged in the complaint as the ground of plaintiff's right.

The contract thus shown is indefensible. It was a secret contract by which the parties were to pretend to be competitors for the work to be let, while in fact they were not so. The bids were for four classes or items of work, and were so arranged between the parties beforehand that the bid of plaintiff was lower than defendant's bid as to three of such items, while the defendant's bid was so far below that of plaintiff as to the remaining single item as to make the aggregate of his bid \$35,000, in round numbers, less than that of plaintiff. It is alleged that plaintiff was prepared to bid, and but for the secret agreement would have bid for such work at a figure some forty thousand dollars less than that at which the contract was let. As to this, it is argued in plaintiff's behalf that he was under no obligation to bid upon said work, and might refrain from doing so at his option. But when he seeks to recover for withholding such bid, it is another matter. The tendency of such a recovery will be to encourage combinations among bidders, destroy competition, defeat the object the legislature had in view in requiring such work to be awarded upon bids, and greatly increase the public burdens. If there was nothing more in the case than an agreement not to bid, there could be no recovery under the contract based upon such a consideration. But when the parties presented themselves as competitors for the work they were guilty of a fraud; the tendency of what was thus done was to cause the water committee to believe that the bid of defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee, that in plaintiff's opinion the work could not be profitably done for less than a figure \$35,000 higher than that bid by defendant,

although as a matter of fact plaintiff believed such work could be done, and, except for the collusive agreement with defendant, would have offered to do it for an amount \$75,000 less than that at which the contract was let.

Upon all the cases cited or to be found, and in any view of the case consistent with public policy and the principles of equity, there can be no relief in such a case.

[100] It is not necessary to discuss the minor questions raised by the exceptions to parts of the answer.

The third, ninth, tenth and thirteenth exceptions for impertinence and scandal are allowed. All other exceptions are overruled.

(Signed)

CHARLES B. BELLINGER.

Judge.

Dated August 26, 1895.

[Endorsed]: Filed August 26, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 26th day of August, 1895, there was duly filed in said court, a bill of revivor, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, as Executrix of the
Last Will and Testament of Lee Hoffman,
Deceased,

Defendant.

Bill of Revivor.

To the Honorable Judges of the above-entitled Court.

[101] John McMullen, a citizen of the State of California, and a resident of the city of San Francisco, in said State, brings this his bill of revivor against Julia E. Hoffman, as executrix of the

last will and testament of Lee Hoffman, deceased, a citizen of the State of Oregon, and a resident of the city of Portland, in said State, and thereupon your orator complains and alleges:

That on or about the 19th day of April, 1895, your orator filed a bill in equity in this court against Lee Hoffman claiming an accounting with said Hoffman of certain partnership transactions in said bill of complaint set forth.

That upon the filing of said bill of complaint a writ of subpoena was duly issued and served upon the said Lee Hoffman, the defendant in said suit, and he thereafter duly appeared by counsel and made answer to said bill of complaint, to which answer exceptions for inpertinence and for insufficiency were duly taken and filed by the complainant, and the same were argued and submitted to this Honorable Court on the 3rd day of July, 1895; that, thereafter, to-wit, on the 21st day of July, 1895, the said Lee Hoffman died, leaving a last will and testament, wherein the above-named Julia E. Hoffman was named as executrix, which will was on the 26th day of July, 1895, duly admitted to probate in the county court of Multnomah County, State of Oregon, having jurisdiction thereof, and an order was on said day made duly appointing the said Julia E. Hoffman as executrix of said will, whereupon on said day she qualified as such, and letters testamentary were duly issued to her out of said court, and she is now the duly appointed, qualified and acting executrix of the last will and testament of said Lee Hoffman, deceased.

That your orator is informed and believes, and therefore alleges, that said executrix has assets belonging to the estate of said Lee Hoffman, deceased, in her possession to the amount and value of \$30,000 or thereabouts.

Wherefore your orator prays that the said cause may be revived by the decree of this Honorable Court, and that it may proceed to a decree in his favor in accordance with the prayer of the original bill of complaint herein.

Your orator further prays that a writ of subpoena may issue in due form of law directed to the above-named defendant, Julia E. Hoffman, as executrix of the last will and testament of Lee Hoffman, deceased, requiring her to appear and show cause, if any she has, why this cause should not be revived, and requiring her to make answer to this bill of revival, but not under oath, an answer under oath being waived.

as to what assets there may be in her possession as executrix of the last will and testament of Lee Hoffman, deceased, and if no cause shall be shown by said defendant why said suit should not be revived, that a decree be entered reviving said suit in favor of your orator, and that in case said defendant shall not in her answer make admission that she has in her possession assets of the estate of Lee Hoffman, deceased, sufficient to cover and respond to the demands and requirements made by your orator in his original bill of complaint filed herein, that an account of the estate of said Lee Hoffman, deceased, may be taken by this Honorable Court and the amount of assets belonging thereto applicable to the demands of your orator as set forth in his original bill of complaint may be ascertained and determined. And your orator will ever pray, etc.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

L. B. Cox, Of Counsel.

State of Oregon. }
Multnomah County. } ss.

John McMullen, being duly sworn, says that he knows the contents of the foregoing bill of revivor; that the matters therein set forth of his own knowledge are true, and those therein set forth on information and belief he believes to be true.

JOHN McMULLEN,

Subscribed and sworn to before me this 21st day of August, 1895.

[Seal]

W. E. MITCHELL,
Notary Public for Oregon.

[Endorsed]: Filed August 26, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 26th day of August, 1895, there was issued out of said court a subpoena ad respondendum, in words and figures as follows, to wit:

[104] *In the Circuit Court of the United States for the District of Oregon.*

IN EQUITY.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, as Executrix of the
Last Will and Testament of Lee Hoffman,
Deceased,

Defendant.

No. 2,204.

Subpœna ad Respondendum.

The President of the United States of America, to Julia E. Hoffman, as executrix of the last will and testament of Lee Hoffman, deceased, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of October next, which will be the 7th day of October A. D. 1895, to answer the exigency of a bill of revivor exhibited and filed against you in our said court, wherein John McMullen is complainant, and you are defendant, and further to do and receive what our said Circuit Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

[105] And this is to command you the marshal of said district, or your deputy, to make due service of this our writ of subpoena and to have then and there the same.

Hereof fail not.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 26th day of August, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and

[Seal]

J. A. SLADEN,

Clerk.

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken pro confesso.

[Endorsed]: Returned and filed August 27, 1895. J. A. Sladen, Clerk.

Return of Civil Process.

United States of America, }
District of Oregon. } ss.

[106] I hereby certify that on the 26th day of August, 1895, at Portland, in said district, I duly served the within subpoena ad respondendum upon the therein named Julia E. Hoffman, as executrix of the last will and testament of Lee Hoffman, deceased, by delivering to her, personally, a true copy of said subpoena ad respondendum, duly certified to by me as U. S. marshal, together with a copy of the bill of revivor, in the within entitled cause, duly certified to by L. B. Cox, of counsel for plaintiff.

H. C. GRADY,
United States Marshal.
By Geo. Humphrey,
Deputy.

And afterwards, to-wit, on the 4th day of September, 1895, there was duly filed in said court exceptions to bill of revivor, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the
Last Will and Testament of Lee Hoffman.
Deceased,

Defendant.

Exceptions to Bill of Revivor.

Exceptions taken by the above-named defendant to the bill of revivor filed herein:

[107] First Exception.—To that portion of said bill commencing with the words "That your orator," on line 7 of page 1 of said bill, and extending to and including the words "\$300,000 or thereabouts," on the fourteenth line of the same page, for the reason that the same is impertinent.

Second Exception.—Begin at the words "And requiring her to make answer," on the nineteenth line of the second page of said bill, and extending to and including the words "Lee Hoffman, deceased," on the 22nd line of the same page, for the reason that the same is impertinent.

Third Exception.—Begin at the words "And in that case," on the 25th line of the second page of said bill, and extending to and including the words "and determined," on the first line of the third page thereof, for the reason that same is impertinent.

DOLPH, MALLORY & SIMON,
Solicitors for Defendant.

Due service of the within exceptions by certified copy, as provided by law, is hereby admitted at Portland, Oregon, September, 1895.

COX, COTTON, TEAL & MINOR,
Attorneys for Complainant.

[Endorsed]: Filed September 4. 1895. J. A. Sladen, Clerk.

[108] And afterwards, to-wit, on Thursday, the 5th day of September, 1894, the same being the 129th Judicial day of the regular April term of said court—Present, the Honorable Charles B. Bellinger, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

LEE HOFFMAN.

} No. 2204.

Order.

September 5, 1895.

Now, at this day, on motion of Mr. L. B. Cox, it is ordered that the hearing of this cause upon the exceptions of the defendant to the bill of revivor herein be, and the same is hereby, set for to-morrow, Friday, September 6, 1895.

And afterwards, to-wit, on Friday, the 6th day of September, 1895, the same being the 130th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to-wit:

[109] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

vs.

LEE HOFFMAN.

} No. 2204.

Order Overruling Exceptions to Bill of Revivor.

September 6, 1895.

Now, at this day, comes the plaintiff herein, by Mr. L. B. Cox, of the counsel, and the defendant by Mr. Rufus Mallory,

of counsel, and thereupon, this cause comes on to be heard upon the exceptions of the said defendant to the bill of revivor herein and was argued by counsel; whereupon, it is ordered and adjudged that said exceptions be and the same are hereby, overruled.

And afterwards, to-wit, on the 18th day of September, 1895, there was duly filed in said court answer to bill of revivor, in words and figures as follows, to-wit:

[10] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Plaintiff,

vs.

JULIA E. HOFFMAN as Executrix of the
Last Will and Testament of Lee Hoffman,
Deceased,

Defendant.

Answer to Bill of Revivor.

The answer of Julia E. Hoffman, as executrix of the last will and testament of Lee Hoffman, deceased, to the bill of revivor filed herein.

In answer to said bill of revivor, I say I admit that on the 21st day of July, 1895, Lee Hoffman, in said bill of revivor mentioned died, leaving a last will and testament, in and by which I, Julia E. Hoffman, was named as executrix of said last will and testament; that on the 26th day of July, 1895, said last will was duly admitted to probate in the County Court of Multnomah County, State of Oregon, and on the same day I, Julia E. Hoffman, was duly appointed executrix of said last will, and I thereupon qualified as such executrix and letters testamentary were duly issued and delivered to me by said court.

[11] Answering the allegation in said bill of revivor that the estate of said Lee Hoffman, deceased, in my possession, is of the amount and value of \$300,000, I say no inventory of the estate of said Lee Hoffman, deceased, has yet been completed and filed, and I do not, therefore admit or deny that the assets of

said estate in my possession amount to said sum of \$300,000, but I say that I verily believe that said estate is solvent, and has sufficient assets in my possession to satisfy any judgment or decree which the plaintiff may recover in this suit..

JULIA E. HOFFMAN, Executrix of the Last
Will and Testament of Lee Hoffman, De-
ceased.

DOLPH, MALLORY & SIMON,
Solicitors for Defendant.

[Endorsed]: Filed Sept. 18, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Wednesday, the 25th day of Sep-
tember, 1895, the same being the 146th judicial day of the reg-
ular April term of said court—present, the Honorable Charles
B. Bellinger, United States district judge presiding—the fol-
lowing proceedings were had in said case, to-wit:

[112] *In the Circuit Court of the United States for the District of
Oregon.*

JOHN McMULLEN,	}
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	

Order Reviving Suit.

On this day this cause coming on to be heard upon the
application of the complainant for an order reviving this suit
against Julia E. Hoffman, executrix of the last will and testa-
ment of Lee Hoffman, the original defendant herein, who since
the commencement of this suit has died, upon hearing Mr. W.
W. Cotton, of counsel for the complainant, and it appearing to
the court that after the filing of answer herein by the defend-
ant, Lee Hoffman, he died, testate, and that Julia E. Hoffman

has been duly appointed executrix of his last will and testament, that a bill of revivor was heretofore exhibited in this cause against said Julia E. Hoffman as such executrix and process duly served upon her, and that she has made answer to said bill of revivor admitting that she is the duly appointed and acting executrix of said Lee Hoffman, deceased.

Now, therefore, in consideration of the premises, it is adjudged, ordered, and decreed, that this suit, which became
 [13] abated by the death of the defendant Lee Hoffman, stand revived and be in the same plight and condition as against the said Julia E. Hoffman, executrix of the last will and testament of said Lee Hoffman, deceased, as defendant in his stead, as said suit was at the time of said abatement.

Dated this 25th day of September, 1895.

CHARLES B. BELLINGER, Judge.

[Endorsed]: Filed September 25, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Monday, the 7th day of October, 1895, the same being the 1st judicial day of the regular October term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding, the following proceedings were had in said case, to-wit:

[14] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix
 Substituted for Lee
 Hoffman, Deceased.

No. 2204.

Defendant.

Order.

October 7, 1895.

Now, at this day, on motion of Mr. Wirt Minor, of counsel for the plaintiff herein, it is ordered that said plaintiff be, and he is hereby, allowed to file amendments to his bill of com-

plaint herein, and it is further ordered that he be, and he is hereby, allowed to file his replication herein.

And afterwards, to-wit, on the 7th day of October, 1895, there was duly filed in said court, amendment to the bill of complaint, in words and figures as follows, to-wit:

[115] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix,
Substituted for Lee
Hoffman, Deceased,

Defendant.

Amendment to Bill of Complaint.

To the Honorable Judges of the above-entitled Court.

Your petitioner, John McMullen, respectfully shows that heretofore he exhibited his bill of complaint in this Honorable Court against one Lee Hoffman, and said Lee Hoffman made answer to said bill and afterwards died, and this cause having since been revived by order of this court against Julia E. Hoffman, executrix of the last will and testament of said deceased, your petitioner is advised by his counsel that it is necessary for him to amend his bill of complaint in divers particulars, but he does not require further answer from the defendant.

Your petitioner therefore prays that he may be allowed to make to his said bill of complaint the amendments herewith submitted to the court.

And your petitioner will ever pray, etc.

J. McMULLEN,
Petitioner.

L. B. COX,
Of Counsel for Petitioner.

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix,
Substituted for Lee
Hoffman, Deceased,

Defendant.

To the Judges of the above-entitled Court.

Your orator herein, John McMullen, upon consideration of the answer which was filed herein by the defendant, Lee Hoffman, prays that his bill of complaint may be amended in line 22, on page 7 thereof by adding to the passage which concludes "and the defendant did on said 4th day of December deny, and still denies, the rights of your orator as a partner in said work and his right to an equal share in the profits thereof," the following allegations, to-wit:

"That your orator is advised that among the grounds relied upon by the defendant in his denial of your orator's said rights as a partner there are these: That in the procurement of the contract from the city of Portland herein set forth it was necessary for the defendant, Lee Hoffman, to give a certain bond, with sureties, to the city of Portland for the faithful execution of said contract, and that your orator did not assist in the procurement of said sureties, but required said defendant to procure them alone; that on the 16th day of September, 1893, said defendant expended of his own funds in carrying on the work which was performed under said contract with the city of Portland a large amount of money, to-wit: \$15,990, and that charges for said work were to fall due on the 25th day of September, 1893, to the amount of about \$22,500; that on the 11th day of September 1893, the defendant was notified by the water committee of the city of Portland that said committee was without funds with which to pay the estimate which under the contract was payable on the 25th day of September, and had no assurance that it would be in funds to make said payment, and that in order to be prepared to meet said payment said defendant

secured the sum of \$14,000 on his own account, at loss to himself, which sum of money would not have been necessary if your orator had not refused, as alleged by said defendant, to provide moneys for prosecution of said contract, and that said defendant on said 16th day of September had requested your orator to contribute moneys towards the prosecution of said work; that the defendant denies that your orator contributed anything towards the prosecution of said work under the contract with the city of Portland, but that all that was contributed for such object by any person other than the defendant was contributed by the San Francisco Bridge Co., and not by your orator, and that a certain plant needed and used in the prosecution of said work, and a certain pair of hydraulic shears described in said answer, were so contributed by the San Francisco Bridge Co. and not by your orator.

[118] Thereabout your orator alleges the truth to be that he was willing to aid in the procurement of sureties upon the bond required of the defendant, Lee Hoffman, but said defendant voluntarily assured your orator that he, said defendant, would procure said sureties, and did not desire to have your orator take any action in regard thereto; in regard to the moneys which the defendant, Lee Hoffman, alleged in his answer it was necessary for him to raise in the month of September, 1893, your orator avers the truth to be that said defendant notified your orator on the 16th day of September that he would require your orator to pay in certain moneys on account of said work, but your orator says that at the time said notification was given the defendant was informed, and well knew, that the city of Portland had funds with which to pay the monthly estimate for said work which was to mature on the 25th day of September; that as to whether or not said defendant did procure the sum of \$14,000, or any other sum, on account of moneys to fall due on said 25th day of September, your orator has no knowledge, information or belief, and, therefore, neither admits nor denies the same, but puts defendant to proof thereof: but if the defendant, Lee Hoffman, did raise said moneys, your orator alleges the truth to be that it was wholly unnecessary, and was at the time known to said defendant to be unnecessary, and that same was but a ruse and device on part of defendant to attempt to put your orator in default in regard to said work, and your orator further alleges the truth to be that

with the payment of the moneys which were paid to the defendant, Lee Hoffman, by the said city of Portland in the month of September, 1893, said defendant was fully paid and reimbursed for all moneys which he had theretofore advanced on account of said work, and that the defendant never thereafter was required to advance any moneys on such account, but that all moneys needed in the prosecution of said work were furnished by estimates paid to said defendant by the city of Portland; and in regard to the plant and the hydraulic shears furnished for said work as is set forth in said answer, your orator alleges the truth to be that said plant was the property of the San Francisco Bridge Co., a corporation of which your orator was the principal stockholder and general manager, and that said shears were furnished in the name of said corporation, but that the same were furnished at the instance of your orator and at his charge, and that no charge therefor was ever made by said corporation against the defendant.

L. B. COX, Of Counsel.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

United States of America, }
Northern District of California. } ss.

John McMullen, being duly sworn, deposes and says that he is the above-named complainant; that he has read the foregoing amendments to the bill of complaint herein and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

J. McMULLEN.

120] Subscribed and sworn to before me this 30th day of September, 1895.

[Seal]

JAMES R. KING,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 7, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 7th day of October, 1895, there was duly filed in said court a replication, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix, Substituted for Lee Hoffman, Deceased,
Defendant

Replication to Answer.

The repliant, John McMullen, saving and reserving to himself all and all manner of advantage of exception which may be had [121] and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto saith, that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is uncertain, evasive, and insufficient in law, to be replied unto by this repliant; without this, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true, all which matters and things this repliant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly prays as in and by his said bill he hath already prayed.

L. B. COX, W. W. COTTON, J. N. TEAL, and
WIRT MINOR,
Solicitors for Complainant.

United States of America, } ss.
Northern District of California. }

On this 30th day of September, 1895, before me, the undersigned, personally appeared John McMullen, who being by

me duly sworn says that he has read the foregoing replication and knows the contents thereof, and that the same is true.

JOHN McMULLEN.

Subscribed and sworn to before me the day and year above written.

[Seal]

JAMES L. KING,

Notary Public in and for the City and County of San Francisco,
State of California.

2] Service by copy admitted at Portland, Oregon, Oct. 7th,
1895.

RUFUS MALLORY,

Of Attorneys for Deft.

[Endorsed]: Filed Oct. 7, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Wednesday, the 27th day of November, 1895, the same being the 45th Judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge, presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Administratrix.

} No. 220'

Order.

November 27, 1895.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for the plaintiff herein, it is ordered that the testimony to be taken in this cause be taken before Mr. George A. Brodie, one of the examiners of this court.

[123]

And afterwards, to-wit, on the 16th day of December, 1895, there was duly filed in said court, a stipulation extending time for taking and submitting evidence of both parties, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the
Last Will of LEE HOFFMAN, Deceased.
Defendant.

Stipulation.

It is hereby stipulated and agreed between the parties to the above-entitled cause that the time for taking and submitting evidence in this cause on behalf of both parties may be extended until the first day of February, 1896.

COX, COTTON, TEAL, & MINOR,

Solicitors for Complainant.

DOLPH, MALLORY & SIMON,

Solicitors for Defendant.

[Endorsed]: Filed December 16, 1895. J. A. Sladen, Clerk

[124]

And afterwards, to-wit, on Monday, the 16th day of December, 1895, the same being the 60th Judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding, the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Administratrix.

} No. 2204.

Order.

December 16th, 1895.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for the plaintiff herein, it is ordered that the time heretofore allowed said plaintiff in which to take his testimony herein, be, and the same is hereby, extended to Saturday, February 1, 1896.

And afterwards, to-wit, on the 23d day of December, 1895, there was duly filed in said court notice of motion to modify order to take testimony, in words and figures as follows, to-wit:

125] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Plaintiff,

vs.

JULIA E. HOFFMAN, Executrix of Lee
Hoffman Deceased.

Defendant.

Motion to Modify.

To John McMullen, Plaintiff, or to Cox, Cotton, Teal, & Minor, his Solicitors.

Please take notice that the defendant will apply to the Court on Saturday, the 28th day of December, 1895, at 10 o'clock A. M. of said day, or as soon thereafter as a hearing can be had, for an order modifying the order heretofore made herein ap-

pointing George A. Brodie, Esquire, examiner, to take and report the evidence in this case, by adding to said order a provision that said examiner first take and report to the Court all the testimony of the witnesses for both parties upon the issues presented in the pleadings as to the good faith of the said plaintiff and Lee Hoffman, deceased, in bidding for and procuring the contract of Hoffman & Bates with the water committee of the city of Portland, described in the pleading filed [126] in the case, and out of which the money was obtained for which the defendant is asked by the complaint filed by the plaintiff he rein to account.

DOLPH, MALLORY & SIMON,

Solicitors for Defendant.

Due service of the within notice by certified copy, as provided by law, is hereby admitted at Portland, Or., Dec. 23rd, 1895.

COX, COTTON, TEAL & MINOR,

Solicitors for Plaintiff.

[Endorsed]: Filed Decem. 23, 1895. J. A. Sladen, Clerk.

And afterwards, to-wit, on Saturday, the 28th day of December, 1895, the same being the 70th Judicial day of the regular October term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix.

} No. 2204.

Order.

December 28, 1895.

Now, at this day comes the plaintiff, by Mr. L. B. Cox, of [127] counsel, and the defendant by Mr. Rufus Mallory, of counsel,

and thereupon said defendant moves the Court for an order instructing the examiner heretofore designated to take testimony in this cause, that said examiner shall take only such testimony as refers to the alleged partnership of the parties hereto, on consideration whereof, it is ordered and adjudged that said motion be, and it is hereby, denied.

And afterwards, to-wit, on Friday, the 31st day of January, 1896, the same being the 98th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Administratrix.

} No. 2204.

Order.

January 31, 1896.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for
28] the plaintiff, and upon stipulation of the parties herein, it is ordered that the time heretofore granted in which to take testimony in this cause be, and the same is hereby, extended to Saturday, February 15, 1896.

And afterwards, to-wit, on Monday, the 10th day of February, 1896, the same being the 106th judicial day of the regular October term of said court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Administratrix.

} No. 2204.

Order.

February 10, 1896.

Now, at this day, on motion of Mr. L. B. Cox, of counsel for the plaintiff, it is ordered that this cause, and the same is hereby, set for trial on Monday, March 2d, 1896.

[129] And afterwards, to-wit, on Tuesday, the 23d day of June, 1896, the same being the 62nd judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN Mc MULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of
the last will of Lee Hoffman, Deceased.
Defendant.

Findings of the Court.

This cause came on to be heard on the second day of March, 1896, upon the issues joined by the pleadings and the proofs taken in support thereof, and was argued by counsel, and the Court not being advised as to what decree should be made in the premises took the matter under consideration until this day; and on this 23rd day of June, 1896, the Court, having duly

considered said pleadings and the evidence introduced in support thereof and the arguments of counsel thereon, finds therefrom as follows, to-wit:

[130] 1. That on the sixth day of March, 1893, Lee Hoffman, since deceased, was entitled to a contract with the city of Portland, in the State of Oregon, for the manufacture and laying of steel pipe from the head works to a point designated as Mount Tabor on a system of waterworks then about to be constructed by the said city of Portland, and for furnishing material therefor, the price to be paid for the same being \$465,667.00; and on said day the said Lee Hoffman and the complainant entered into a written agreement, wherein for valuable consideration it was agreed by and between them that they would jointly execute the work to be done under said contract and furnish the material therefor, each contributing equally to the cost thereof and sharing equally the profits and losses which might result therefrom; and it was further agreed in said instrument that if either party thereto should get a contract to do, or should do, any other part of the work for bringing water to Portland, in connection with said system of waterworks, the profits and losses of such other work should be shared by them jointly.

2. That on the tenth day of March, 1893, a contract was entered into by and between the city of Portland and said Lee Hoffman, in the firm name of Hoffman & Bates, for doing said work and furnishing said material for the amount of money above specified, it also being stipulated in said contract that said city of Portland had the right at any time during the progress of the work to make necessary modifications of the plans, specifications and locations, and in such cases the compensation provided in said contract should be increased or reduced in proportion to the increase or reduction of expense resulting from such modifications.

[131] 3. That the complainant at the time of entering into said contract was a resident of the city of San Francisco, State of California, and said Lee Hoffman was a resident of the said city of Portland, and it was further agreed between them that said Lee Hoffman should have and exercise the active superintendency of said work, but no agreement was entered into between them as to the amount of his compensation therefor.

4. That upon the execution of the contract above-mentioned between said Lee Hoffman and the city of Portland, and in pursuance of the contract between the said Lee Hoffman and the complainant, they, the said Lee Hoffman and the complainant, proceeded with the prosecution of the work contemplated to be done under the contract with the city of Portland, and to furnish materials therefor, said contract having been modified in divers particulars during its progress, the effect whereof was to increase its expense; and, about and prior to the first day of December, 1894, the work to be done and material to be furnished under said contract as modified were completed, and there was earned on said contract the sum of \$509,825.22, of which there was paid to the said Lee Hoffman at divers times on and prior to December 20, 1894, the sum of \$458,842.70, and the sum of \$50,982.52 was withheld by said city of Portland, and less the sum of \$18,627.17 paid to Wolff, Zwicker & Buehner as a debt owing from the complainant and defendant, as hereinafter mentioned, the same is unpaid, although earned and due; that the complainant and the said Lee Hoffman did other work and furnished other material in connection with said contract, for the purpose of bringing water to Portland, and thereby claim to have earned the sum of \$31,073.49, of which the city of Portland has allowed the sum of \$14,112.24, and has disallowed the sum of \$16,961.25. Of said sum of \$14,112.24 there was paid to the said Lee Hoffman at various dates on and prior to the 20th day of December, 1894, the sum of \$11,848.81, and the sum of \$2,263.43 is now withheld by the city of Portland and is unpaid, although earned and due.

5. That the said Lee Hoffman and complainant earned other moneys in the conduct of a camp and supply store for the laborers employed on the work by them conducted, and realized a sum of money on the sale of livestock owned by them and sold at the completion of said work, all of which moneys were paid to the said Lee Hoffman, and have ever since been held by him and the defendant, and no part thereof has been paid to complainant.

6. That the said Lee Hoffman, during his lifetime, and the defendant, as his executrix since his decease, have denied to the complainant any and all interest in the contract between

[133] said Lee Hoffman and the city of Portland, and the work done and material furnished thereunder or in connection therewith and the moneys earned therefrom, as well as in the other work above mentioned as having been performed in bringing water to the city of Portland and moneys earned therefrom, and also in the other moneys realized and received by the said Lee Hoffman from the camp account and the store account and the sale of livestock above mentioned, and the said Lee Hoffman and the defendant have failed and refused to account to the complainant for any of said work, material, or moneys, although the complainant had demanded an accounting and settlement prior to the institution of this suit, but they, the said Lee Hoffman and the defendant, have claimed, and now claim, to hold all said moneys as their own.

7. That the sum of one thousand dollars per month for the period of twenty months, to-wit, from the first day of May, 1893, to the first day of January, 1895, as charged and drawn by said Lee Hoffman, is proper compensation for his services for superintending said work, and the same is hereby allowed as a charge against the joint account in the settlement between the parties to this suit.

8. That a full and true statement of the account between the parties hereto touching the work, material and operations above mentioned, and the moneys earned thereon, and showing the moneys which the complainant is now entitled to recover from the defendant is as follows, to-wit:

Total allowed and received from the city of Portland.

On contract,	\$509,825.22	
For extra work,	14,496.74	
		\$524,321.96
Profits of camp, store, sale of livestock,		
Interest, etc., etc.,		15,339.76
		<hr/>
Grand total,		\$539,661.72
Total gross cost of work, including salary of \$20,000 to Lee Hoffman,		\$434,622.13
		<hr/>
Balance,		\$105,039.59

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Amount retained by city of Portland,	
On account of contract,	\$50,982.52
“ “ “ extra work,	2,263.43
	<hr/>
	\$53,245.95
Less amount paid to Wolff,	
Zwicker & Buehner,	18,627.17
	<hr/>
Now held by city of Portland,	\$34,618.78
Amount drawn out by Lee Hoffman	
and defendant,	72,737.70
	<hr/>
	\$107,356.48
Amount to be paid to San Francisco	
Bridge Co.,	2,316.89
	<hr/>
Balance as above,	\$105,039.59
One-half thereof owing complainant,	\$ 52,519.80

9. That in addition to the moneys above mentioned the complainant and defendant are the owners jointly of the following assets, the true present value of which has not been shown, to-wit: Plant and tools, cost price, \$6,234.60; furniture and fixtures, cost price, \$187.85; camp fixtures, cost price, \$1,246.16; miscellaneous accounts, \$188.75; disallowed claim against the city of Portland, \$16,961.25.

Thereupon, in consideration of the premises, it was ordered, [35] adjudged, and decreed as follows, to-wit:

That the complainant and said Lee Hoffman were partners in the contract between said Hoffman and the city of Portland, and in all the matters and things hereinbefore set forth, and the complainant as such partner, is entitled to an accounting with the defendant as to the receipts and disbursements of the moneys paid or to be paid by the city of Portland on account of its contract with said Lee Hoffman, and the work performed and material furnished by the complainant and said Lee Hoffman thereunder, or in connection therewith, as well as other work done for the purpose of bringing water to the city of Portland, and also as to all the other operations in connection with said work and the moneys received therefrom,

as above set forth; that the complainant is a half-owner with the defendant of the plant and tools, office furniture and fixtures, camp equipment, and all other such property above-mentioned, and that the same be sold and the proceeds be divided between the complainant and defendant; that the complainant is a half owner with the defendant in whatever interest she has in the disputed claim of \$16,961.25 against the city of Portland above mentioned; that the defendant forthwith pay to the San Francisco Bridge Company, out of the moneys in her possession drawn from the proceeds of said work, the sum of \$2,316.89; that the costs of suit of both parties, taxed at \$557.24 be paid out of the common fund, neither party recovering costs of the other, and that the complainant recover judgment against the defendant for the sum of \$52,241.18.

- [136] It is further ordered that the provisional order of injunction heretofore issued against the said Lee Hoffman and continued against the defendant, inhibiting them from drawing from the city of Portland the moneys now held by it as above-mentioned, be discharged in accordance with the stipulation of the parties filed herein.

(Signed)

CHARLES B. BELLINGER,

Judge.

[Endorsed]: Filed June 23, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 23d day of June, 1896, there was duly filed in said court, an opinion of the Court on final hearing in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon

McMULLEN,

vs.

HOFFMAN.

} No. 2204.

Opinion on Final Hearing.

BELLINGER, J.

This is a suit for an accounting for the profits earned on a [137] contract to construct a pipe line by which the city of Port-

land is supplied with water. The water committee representing the city having advertised for bids to construct the line, the parties hereto entered into an agreement by which the defendants on their joint account bid for the work in the name of Hoffman & Bates. The complainant, with the knowledge and concurrence of defendant, made a separate bid in the name of the San Francisco Bridge Company, a company controlled by him. This bid was some \$49,000 higher than the bid of the defendant and was not seriously made. The contract having been awarded to the defendant, a written agreement was entered into by the parties for the execution on joint account of the contract to be entered into by the defendant with the city. The contract awarded on defendant's bid was formally entered into by the city water committee of the one part and by the defendant, in the name of Hoffman & Bates, of the other. The contract proved a profitable one, the profits thereunder amounting to nearly \$140,000. The defendant refused to account to the plaintiff for any part of these profits, upon the ground that the agreement for a joint bid tended, under the circumstances, to lessen competition, and operated as a fraud upon the city, and therefore will not be enforced in equity, and upon the further ground that the complainant wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement to share the earnings of the contract with complainant was made.

[138] In this case the contract was in fact the joint contract of these two parties. However immoral the means by which the award of that contract was secured to them, it does not lie in the mouth of either to dispute upon such grounds the right of the other to share in the profits of that contract. This principle has been applied where the contracts were to do what was forbidden by law or by public policy, and were executed, although in this case the contract was to do a lawful thing. It is only when the fund is the result of an immoral transaction that contribution between the wrongdoers will not be enforced. If the means by which this contract was procured are immoral, this would be a good ground for a refusal by an injured party to abide by its conditions. Nor is it a case where one party seeks to enforce an illegal agreement for a share in the profits of a

contract held by another, as was my conclusion when the case was considered upon exceptions to the answer. The contract with the city was, as between the parties, the contract of McMullen & Hoffman. It makes no difference in whose name it was taken, although in fact it was taken in the name of neither, but in that of Hoffman & Bates for the benefit of Hoffman and McMullen. The case is not in the least different from what it would be if the suit was by Hoffman against McMullen for a division of moneys received from the profits of this contract by the latter.

When these questions were considered by me on the exceptions to the answer (69 Fed. R. 509), I was of the opinion that it was within the principle of those cases involving agreements for a division of the fees of public offices and for compensation for services in lobbying. This, I am convinced, was an erroneous view of the question. In one of those cases the Court is asked to compel by its judgment the very thing prohibited by public policy, while in other it is asked to compel payment for a service forbidden by such policy. The question of division of profits between two parties having equal right is a very different one. The distribution of the profits of this contract, which are as much the property of one of the parties as of the other, does not violate any rule of morals or of public policy.

Moreover, the case on the facts differs materially from that presented on the exception to the answer. It is alleged in the answer that the plaintiff was prepared to bid, and but for the secret agreement alleged to have been made, would have bid for the work at a figure some \$40,000 less than that at which the contract was let. This put the plaintiff in the position of seeking to recover in the suit for withholding a lower bid, by which the work was made to cost much more than it would otherwise have cost, and brought the case within the principle of *Atchison v. Mallon*, 43 N. Y. 150, cited and relied on by defendant. In that case each of the parties had intended to make a proposal on his own account, but by an agreement between them to share equally in the profits of an award made to either, one of them had been removed from the number of earnest bidders, thus lessening competition, to the public detriment. Folger, Judge, in delivering the opinion of the Court, said: "If Mallon had promised Atchison a sum of money if he

[140] would refrain from making any proposal, and Atchison, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any consideration for the parties to it, but because its effect was to remove Atchison from the number of earnest bidders, and thus by lessening competition to detriment the public. And the agreement which was made, laying open to Mallon, just what was the judgment of Atchison of a profitable bid, and removing in effect an interested rival, tended to affect Mallon's action. While Atchison, confident that if Mallon succeeded it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements Courts refuse to enforce."

In this case the uncontradicted fact is that McMullen did not intend to bid for the work in question otherwise than jointly with Hoffman; that he came from San Francisco to bid with Hoffman, not to compete with him, and that this was in pursuance of an understanding had between the parties long before. The agreement was merely to secure co-operation between the parties, and so far from tending to lessen competition, it tended to increase the number of bidders since it does not appear that either of the parties intended to bid or would have bid on his own account. However this may be, it does not appear that the effect of the agreement was to cause, through McMullen's influence, a very much lower bid than Hoffman would have made had he bid on his own account. Hoffman stated to one of the witnesses in the case, that McMullen "made him come down between \$40,000 and \$50,000" in the bid upon which the contract was awarded. It appears [141] that McMullen had procured from his engineer in New York estimates of the cost of the work, and that the amount of such estimate was \$416,088, and there was testimony tending to show that this estimate included \$80,500 as profits. It also appears that Hoffman's engineer at Portland upon careful estimates concluded that the work could be done for \$420,000. What, if anything, was allowed for profits in this estimate does not appear. The defendant's counsel argues from these facts that the knowledge of each of these parties that this work

could be done at a figure far below the bid agreed on and yet leave a large margin for profit would have caused them to make much lower bids, if they had been bidding in competition, than the joint bid made in the name of Hoffman & Bates. But it does not follow that in the absence of an agreement to bid jointly any such several bids would have been made, or that estimates would have been procured; nor is it a ground of complaint that the parties had the advice of capable engineers, and were able to know beforehand that the work could be done for \$416,000 and leave a profit of at least \$80,000. They were under no moral obligation to lower their bid because of the information they had procured, nor in any manner to give the city the benefit of the knowledge they had acquired at their own expense, even if the means of such knowledge were not within the city's reach. There is nothing to criticise in what was done by the parties, unless their conduct in presenting a second bid in the name of the San Francisco Bridge Company operated as a fraud on the committee. When this matter was considered on the exceptions to the answer, I was of the opinion that this was the effect of the second bid. It appeared from the pleadings that the profits from the contract at \$465,667 amounted to nearly \$140,000, and it seemed a necessary inference that a bid by a company such as the one in question, based presumably upon careful estimates, to do the work for \$514,664, influenced the award that was made. But this view cannot be sustained. An attempt to deceive must be successful in order to operate as a fraud. If the second bid in this case was in effect a misrepresentation made with a fraudulent intent, it must, in order to avail the defendant, appear to have been acted upon by the committee—to have influenced their action to the public detriment. However reprehensible the act of the parties was in making the second bid, there is no presumption of fraud arising from it, and it does not appear from the evidence in the case that the water committee was in any degree influenced by it in awarding the contract. On the contrary, the testimony of the chairman of the committee is that the bid of the San Francisco Bridge Company did not have the slightest influence with him, and it appears that the engineer of the water committee had, some three months previously, made for the information of the committee, an esti-

42]

mate of the cost of the work covered by these bids, and that such estimate was higher than the bid of the San Francisco Bridge Company. That bid, as already stated, was \$514,664. How much higher the city engineer's estimate was than this figure is not stated. But with this estimate, higher than the second bid and nearly \$50,000 higher than the bid of Hoffman & Bates, before them, there is, without the testimony referred to, no room for an inference that the committee was influenced [143] by the second bid, or consulted it. Moreover, it is in evidence that there were three higher bids than that of the San Francisco Bridge Company before the committee when the contract was awarded to Hoffman & Bates.

In the accounting the only question of serious contest is as to the amount to be allowed Hoffman for his services in conducting the business of the parties under their contract. Hoffman claimed and credited himself at the rate of \$1,000 per month for his services. In fixing the amount to be allowed on this account the responsibility assumed by Hoffman is to be considered. McMullen wholly failed to contribute his share or any share, above a plant valued at \$2,000, to the work being carried on. Hoffman made repeated and urgent appeals to McMullen for the money that the latter was in duty bound to provide. To these appeals McMullen had always the same answer, which was that he did not have the money then and could not obtain it. On one occasion he suggested that Hoffman should stand the creditors of the partnership off; and he suggested at different times the means by which Hoffman might raise the needed money on their joint note. It is argued for McMullen that Hoffman had credit at the banks, and could borrow what money was needed, but that does not excuse McMullen for failure to fulfill the obligations he was under. Hoffman was not required to use his own credit for McMullen's benefit. McMullen was a nonresident. His company was insolvent. He was without credit, and it is not against Hoffman that his own credit was good. McMullen's name upon a joint note would be of no assistance to Hoffman in procuring needed funds, which after all must be had upon Hoffman's credit. [144] There was such an entire failure on McMullen's part to fulfill his obligations in the contract, that Hoffman would, in my judgment, have been justified in treating the contract as aban-

done by McMullen, and this was threatened. It is only from the fact that Hoffman continued to recognize McMullen's relation in the business by regularly charging for his own services that I am justified in treating the partnership relation as having continued. The entire burden was upon Hoffman, and it involved not only the conduct of the business of constructing the work, but all the money responsibility that attached to it, and this goes to increase the amount to which Hoffman is in good conscience entitled for his services, on which account he is entitled to be paid at the rate charged.

(Signed) CHARLES B. BELLINGER,
Judge.

[Endorsed]: Filed June 23, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 23d day of June, 1896, there was duly filed in said court a stipulation, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant.

vs.

JULIA E. HOFFMAN, Executrix of the
Last Will of Lee Hoffman, Deceased,

Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit that the provisional order of injunction heretofore issued against the defendant herein, inhibiting and restraining her from drawing from the city of Portland the moneys now owing from said city of Portland on account of the contract between the city and Lee Hoffman, deceased, for the manufacture and laying of steel pipe from head works to Mount Tabor in the system of waterworks constructed for

the city of Portland, and extra work done in connection therewith, be modified so that the defendant, acting jointly with the complainant, may be, and she hereby is, allowed to draw from the city of Portland the sum of money now owing by it on said account, to-wit, \$34,618.78, together with such interest as may be recoverable thereon.

- [146] And it is further stipulated that in case said moneys are paid by the city of Portland to the parties to this suit jointly, they will jointly deposit the same with the Security Savings & Trust Company, of the city of Portland, subject to the joint order of the complainant and defendant, or their counsel; if the defendant shall within fifty-seven days from this date, said money in the meantime having been paid over and deposited as aforesaid, take an appeal from the decree rendered herein, and give a supersedeas bond, then the moneys on deposit shall be drawn by the defendant, and the complainant, or his counsel, will join in an order on the bank therefor; but if the defendant shall not within the said time take such appeal and give such supersedeas bond, then the moneys shall be drawn by the complainant and applied to the satisfaction of his judgment against the defendant, and the counsel for the defendant will join in an order therefor; in case said money shall not be paid over by the city of Portland within said fifty-seven days, then in case it shall be thereafter paid the same disposition thereof shall be made, that is to say, if an appeal has been taken by the defendant within said fifty-seven days and a supersedeas bond given, the money shall be retained by her, otherwise it is to be paid to the complainant and applied on his judgment.

Dated this 23d day of June, 1896.

COX, COTTON, TEAL & MINOR,

Solicitors for Complainant.

DOLPH, MALLORY & SIMON,

Solicitors for Defendant.

[Endorsed]: Filed June 23, 1896. J. A. Sladen, Clerk.

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- [147] And afterwards, to-wit, on the 15th day of July, 1896, there was duly filed in said court a cost bill, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix,

Defendant.

Memorandum of Costs.

Statement of disbursements claimed by the complainant in the above-entitled cause, viz:

Clerk's fees	\$ 77.32
Marshal's fees	21.36
Costs in State Circuit Court	
Attorney's fee	20.00
Attorney's fee for taking 2 depositions, at \$2.50 each.	5.00
Depositions	20.70
Examiner's fees	199.90
Referee's fees	
Witness' fees: Isaac Smith, \$3.25; F. T. Dodge, \$3.25;	
P. L. Willis, \$1.62; J. Kiernan, \$1.62; P. Buchner,	
\$1.62; J. B. David, \$4.50; R. Wakefield, \$1.62; D. P.	
48] Thompson, \$1.62; J. Bays, \$1.62; S. W. Aldrich,	
\$1.62; J. B. Montgomery, \$1.62; A. Donnell, \$1.62..	25.58
Exhibits	3.50
<hr/>	
Total taxed at	373.36

J. A. SLADEN,

Clerk.

Service of the within statement of costs served on me this 15th day of July, 1896.

RUFUS MALLORY,

Of Sol'r's for Deft.

District of Oregon, ss.

I, L. B. Cox, being duly sworn, on my oath say that I am one of the attorneys for the complainant in the above-entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit; and that said complainant is entitled to recover the same from the defendant, as I verily believe.

L. B. COX.

Subscribed and sworn to before me this 15th day of July, 1896.

[Seal]

JOSEPH N. TEAL.
Notary Public for Oregon.

[Endorsed]: Filed July 15, 1896. J. A. Sladen, Clerk.

49]

And afterward, to-wit, on the 4th day of August, 1896, there was duly filed in said court, a petition for appeal, and assignment of errors, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Administratrix of
the Estate of Lee Hoffman, Deceased.

Defendant.

Petition for Appeal.

To the Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit.

Your petitioner, Julia E. Hoffman, executrix of the last will of Lee Hoffman, deceased, defendant herein, brings this her petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered before your Honors in the above-entitled cause, on the 23rd day of June, 1896; and thereupon, as for such petition,

your petitioner shows that your petitioner is defendant in the above-entitled cause. That the complainant's complaint therein is for a decree declaring a partnership to have existed 50] between the complainant and Lee Hoffman in his lifetime, for performing a certain contract entered into between said Lee Hoffman, in the name of Hoffman & Bates, with the water committee of the city of Portland, Oregon, dated the 10th day of March, 1893, for manufacturing and laying certain steel pipe for conveying the water of Bull Run river to Mount Tabor for an accounting of the business of such partnership and a division of the profits thereof, and for an accounting for and division of the profits derived from extra work claimed to have been done in connection with said manufacturing and laying of said pipe, and an accounting for profits alleged to have been realized from camp stores and other sources connected with said work, and for the dissolution of said partnership, for a receiver and other relief in said bill of complaint set forth. That defendant answered said bill of complaint and the complainant filed exceptions thereto. Pending said exceptions said Lee Hoffman deceased, and Julia E. Hoffman, executrix of the will of said Lee Hoffman, was substituted as defendant. Said exceptions were, after argument, overruled, and complainant filed a general replication to said answer, and thereupon this cause was heard upon the evidence and a decree for relief substantially as prayed for was on the said 23rd day of June, 1896, rendered against said defendant.

Wherefore your petitioner now prays an order to be made allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree so entered. And thereupon your petitioner now shows to the Court that she is advised by her counsel, and so charges the same to be, that 51] there was error of said Circuit Court, by the Court committed, in the course of the proceedings in the said cause in the decree so as aforesaid tried; and your petitioner now respectfully sets forth and shows that error was committed, and makes the following assignments thereon as for her assignments of error on her appeal.

Assignment of Errors.

It is respectfully submitted that error was committed by said court:

First. In making findings numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, and 9, and in making and entering the following decree in said cause on the 23rd day of June, 1896, to-wit:

"This cause came on to be heard on the second day of March, 1896, upon the issues joined by the pleadings and the proofs taken in support thereof, and was argued by counsel, and the Court not being advised as to what decree should be made in the premises took the matter under consideration until this day and on this 23d day June, 1896, the Court, having duly considered said pleadings and the evidence introduced in support thereof, and the arguments of counsel thereon, finds therefrom as follows, to-wit:

[152] 1. That on the sixth day of March, 1893, Lee Hoffman, since deceased, was entitled to a contract with the city of Portland, in the State of Oregon, for the manufacture and laying of steel pipe from the head works to a point designated as Mount Tabor on a system of waterworks then about to be constructed by the said city of Portland, and for furnishing material therefor, the price to be paid for the same being \$465,667.00; and on said day the said Lee Hoffman and the complainant entered into a written agreement, wherein for valuable consideration it was agreed by and between them that they would jointly execute the work to be done under said contract and furnish the material therefor, each contributing equally to the cost thereof and sharing equally the profits and losses which might result therefrom, and it was further agreed in said instrument that if either party thereto should get a contract to do, or should do, any other part of the work for bringing water to Portland, in connection with said system of waterworks, the profits and losses of such work should be shared by them jointly.

2. That on the tenth day of March, 1893, a contract was entered into by and between the city of Portland and said Lee Hoffman, in the firm name of Hoffman & Bates, for doing said work and furnishing said material for the amount of money above specified, it also being stipulated in said contract that said city of Portland had the right at any time during the progress of the said work to make necessary modifications to the

plans, specifications and locations, and in such cases the compensation provided in said contract should be increased or reduced in proportion to the increase or reduction of expense resulting from such modifications.

53] 3. That the complainant at the time of entering into said contract was a resident of the city of San Francisco, State of California, and said Lee Hoffman was a resident of the city of Portland, and it was further agreed between them that said Lee Hoffman should have and exercise the active superintendency of said work, but no agreement was entered into between them as to the amount of his compensation therefor.

4. That upon the execution of the contract above mentioned between said Lee Hoffman and the city of Portland, and in pursuance of the contract between the said Lee Hoffman and the complainant, they, the said Lee Hoffman and the complainant, proceeded with the prosecution of the work contemplated to be done under the contract with the city of Portland and to furnish materials therefor, said contract having modified in divers particulars during its progress, the effect whereof was to increase its expense; and, about and prior to the first day of December, 1894, the work to be done and material to be furnished under said contract as modified were completed, and there was earned on said contract the sum of \$509,825.22, of which there was paid to the said Lee Hoffman at divers times on and prior to December 20, 1894, the sum of \$458,842.70, and the sum of \$50,982.52 was withheld by said city of Portland, and, less the sum of \$18,627.17 paid to Wolf, Zwicker and Buehner as a debt owing from the complainant and defendant as hereinafter mentioned, the same is unpaid, although earned and due; that the complainant and said Lee Hoffman did other work and furnished other material in connection with said contract, for the purpose of bringing water to Portland, and 154] thereby claim to have earned the sum of \$31,073.49, of which the city of Portland has allowed the sum of \$14,112.24, and had disallowed the sum of \$16,961.25. Of said sum of \$14,112.24 there was paid to the said Lee Hoffman at various dates on and prior to the 20th day of December, 1894, the sum of \$11,848.81 and the sum of \$2,263.43 is now withheld by the city of Portland, and is unpaid, although earned and due.

5. That the said Lee Hoffman and complainant earned other in the conduct of a camp and supply store for the laborers em-

ployed on the work by them conducted, and realized a sum of money on the sale of livestock owned by them and sold at the completion of said work, all of which moneys were paid to the said Lee Hoffman, and have ever since been held by him and the defendant for their own use, and no part thereof has been paid to complainant.

[155] 6. That the said Lee Hoffman, during his lifetime, and the defendant, as his executrix since his decease, have denied to the complainant any and all interest in the contract between said Lee Hoffman and the city of Portland, and the work done and material furnished thereunder or in connection therewith and the moneys earned therefrom, as well as in the other work above mentioned as having been performed in bringing water into the city of Portland and the moneys earned therefrom and also in the other moneys realized and received by the said Lee Hoffman from the camp account and the store account and the sale of livestock above mentioned, and the said Lee Hoffman and the defendant have failed and refused to account to the complainant for any of said work, material or moneys, although the complainant had demanded an accounting and settlement prior to the institution of this suit, but they, the said Lee Hoffman and the defendant, have claimed, and now claim, to hold all said moneys as their own.

7. That the sum of one thousand dollars per month for the period of twenty months, to-wit, from the first day of May 1893, to the first day of January, 1895, as charged and drawn by said Lee Hoffman, is proper compensation for his services for superintending said work and the same is hereby allowed as a charge against the joint account in the settlement between the parties to this suit.

8. That a full and true statement of the account between the parties hereto touching the work, material and operations above mentioned, and the moneys earned thereon, and showing the moneys which the complainant is now entitled to recover from the defendant is as follows, to-wit:

Total allowed and received from the city of Portland.

On contract,	\$509,825.22
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For extra work,	14,496.74
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\$524,321.96

Profits of camp, store, sale of livestock,

Interest, etc., etc.,

15,339.76

Grand total	\$539,661.72
Total gross cost of work, including salary of \$20,000 to Lee Hoffman,	\$434,622.13
Balance,	\$105,039.59
156] Amount retained by city of Portland,	
On account of contract,	\$50,982.52
" " " extra work,	2,263.43
	53,245.95
Less amount paid to Wolff, Zwicker & Buehner,	18,627.17
Now held by city of Portland,	\$34,618.78
Amount drawn out by Lee Hoffman and defendant.	72,737.70
	\$107,356.48
Amount to be paid to San Francisco Bridge Co.,	2,316.89
Balance as above,	\$105,039.59
One-half thereof owing complainant,	\$ 52,519.80

9. That in addition to the moneys above mentioned the complainant and defendant are the owners jointly of the following assets, the true present value of which has not been shown, to-wit: Plant and tools, cost price, \$6,234.60; furniture and fixtures, cost price, \$187.85; camp fixtures, cost price, \$1,246.16; miscellaneous accounts, \$188.75; disallowed claim against the city of Portland, \$16,961.25.

Thereupon in consideration of the premises it was ordered, adjudged and decreed as follows, to-wit:

157] That the complainant and said Lee Hoffman were partners in the contract between said Hoffman and the city of Portland and in all the matters and things hereinbefore set forth, and the complainant, as such partner, is entitled to an accounting with the defendant as to the receipts and disbursements of the money paid or to be paid by the city of Portland on account of its contract with said Lee Hoffman and the work performed and material furnished by the complainant and said Lee Hoffman thereunder, or in connection therewith, as well as other

work done for the purpose of bringing water to the city of Portland, and also as to all the other operations in connection with said work and the moneys received therefrom, as above set forth; that the complainant is a half owner with the defendant of the plant and tools, office furniture and fixtures, camp equipment and all other such property above mentioned, and that the same be sold and the proceeds be divided between the complainant and defendant; that the complainant is a half owner with the defendant in whatever interest she has in the disputed claim of \$16,961.25 against the city of Portland above mentioned; that the defendant forthwith pay to the San Francisco Bridge Company, out of moneys in her possession drawn from the proceeds of said work, the sum of \$2,316.89; that the cost of suit of both parties, taxed at \$557.24, be paid out of the common fund, neither party recovering costs of the other, and that the complainant recover judgment against the defendant for the sum of \$52,241.18.

[158] It is further ordered that the provisional order of injunction heretofore issued against said Lee Hoffman and continued against the defendant, inhibiting them from drawing from the city of Portland the moneys now held by it as above mentioned, be discharged in accordance with the stipulation of the parties filed herein."

Because it appears by the complaint and answers of the defendant to the bill of complaint filed in the said cause, and by the testimony submitted on the trial and fully set out in the record, that the alleged contract of partnership sought by said complainant to have established by decree of this Court and the alleged profits thereof divided was and is void as against public policy, and because the said Court did not render and enter a decree dismissing said bill.

2. It is respectfully submitted that error was committed in said court in said decree in ordering and decreeing that said complainant and Lee Hoffman were partners from the said 6th day of March, 1893, and continued to be such partners up to and until the said 23rd day of June, 1896, and in decreeing that said partnership be then dissolved and in decreeing that said complainant was and is entitled to one-half the profits of said contract, dated the 10th day of March, 1893, made by the water committee of the city of Portland with Hoffman & Bates for the manufacturing and laying steel pipe for

conveying the water from Bull Run river from head works to Mount Tabor, and of extra work done under and in connection with said contract and extra work not connected with said contract, and from camp stores and other sources connected with said work of manufacturing and laying said steel pipe. Because it appears in the answer filed in said cause and from the testimony in the record that said complainant committed a 59] breach of his said agreement contained in said contract of March, 1893, between complainant and Lee Hoffman, and failed, neglected, and refused to pay his share of money necessary to carry on said contract of manufacturing and laying said steel pipe, and that in consequence thereof the said Lee Hoffman on the 20th day of September, 1893, dissolved said partnership, and the same then ceased to exist, and the complainant thereafter took no part in conducting said business, and did not act in connection therewith, and was not thereafter recognized by said Hoffman as a partner therein. That from and after said date the entire control, management, execution and responsibility of said contract was upon the said Lee Hoffman and not upon the complainant, and that any profits which may have been earned after the said 20th day of September, 1893, belonged wholly to the said Hoffman, and did not belong to the said alleged partnership composed of the complainant and said Lee Hoffman. That if said complainant was entitled to any profits whatever as a result of said partnership they were such only as may have been earned between the said 6th day of March, 1893, and the 20th day of September, 1893, and was not entitled to any profits earned after the last named date.

Third. It is respectfully submitted that error was committed by said Court in said decree in decreeing that said complainant recover judgment against the defendant for the sum of \$52,241.18; because it appears from the testimony in the record that of the \$105,039.59 profits of said alleged partnership 60] no more than \$60,421.32 were ever paid or received by the said Lee Hoffman and the defendant. That at the time said decree was rendered, to-wit, on the 23rd day of June, 1896, there were retained in the hands of the water committee of the city of Portland of earnings under said contract the sum of \$34,618.17, which has never been received by or paid to said Lee Hoffman or this defendant, as his executrix, and the complainant is not

entitled to any judgment for any portion of said sum against the defendant.

Fourth. It is respectfully submitted that error was committed by said Court in said decree in ordering and decreeing that the defendant forthwith pay to the San Francisco Bridge Company out of moneys in her possession drawn from the proceeds of said work the sum of \$2,316.89, because the testimony in this cause shows that the complainant claims the said sum of \$2,316.89 as advanced by himself as his contribution to the execution of said contract between himself and Lee Hoffman under the said contract of March 6, 1893, and was not, and is not, due to said San Francisco Bridge Company, but to the complainant, and that no money whatever is due to the San Francisco Bridge Company.

Wherefore said defendant, Julia E. Hoffman, executrix, prays that the said decree and order be reversed, and that said Court may be directed to enter a decree in accordance with the prayer of defendant's answer to the petition herein, or such decree as shall be found to be according to equity under the evidence in this cause.

DOLPH, MALLORY & SIMON,
Solicitors for Defendant.

[Endorsed]: Filed Aug. 4, 1896. J. A. Sladen, Clerk.

[161] And afterwards, to-wit, on Tuesday, the 4th day of August, 1895, the same being the 98th judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix.

Defendant.

Order Allowing Appeal of Julia E. Hoffman.

Now, at this day, comes the defendant, Julia E. Hoffman, by Mr. Rufus Mallory, of counsel, and presents to the Court her petition for the allowance of an appeal from the decree heretofore entered against her in this cause, to the United States Circuit Court of Appeals for the Ninth Circuit, and presents her bond for damages and costs on such appeal with Geo. W. Bates and Robert Wakefield in the sum of \$60,000.00.

Whereupon, it is ordered that said defendant be, and is hereby, allowed to take an appeal to the said Circuit Court of Appeals, as prayed for in said petition, and that said bond be, and the same is hereby, approved.

Dated August 4, 1896.

CHARLES B. BELLINGER,

Judge.

2] [Endorsed]: Filed August 4, 1896. J. A. Sladen, Clerk.

And afterward, to-wit, on the 4th day of August, 1896, there was duly filed in said Court a bond on appeal, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant.

vs.

JULIA E. HOFFMAN, Executrix.

Defendant.

Bond on Appeal of Julia E. Hoffman.

Know All Men by These Presents, that we, Julia E. Hoffman, executrix, as principal, and Geo. W. Bates and Robert Wakefield, as sureties, are held and firmly bound unto John McMullen, the complainant, in the full and just sum of sixty thousand dollars, to be paid to the said John McMullen, his executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 4th day of August, 1896.

[163] Whereas, lately at a Circuit Court of the United States for the District of Oregon in a suit depending in said court between John McMullen, complainant, and Julia E. Hoffman, executrix of the last will of Lee Hoffman, late of Multnomah county, Oregon, deceased, defendant, a decree was rendered against said Julia E. Hoffman, executrix, and said Julia E. Hoffman having obtained a writ of appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit and a citation directed to said John McMullen, and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, on the day of next,

Now, the condition of the above obligation is such, that if the said Julia E. Hoffman, executrix, shall prosecute said writ of appeal to effect and answer all damages and costs, if she fail

to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

JULIA E. HOFFMAN. [Seal]

By **DOLPH, MALLORY & SIMON**, Solicitors.

GEO. W. BATES. [Seal]

ROBT. WAKEFIELD. [Seal]

Sealed and delivered in the presence of:

P. L. Willis.

United States of America, }
District of Oregon. } ss.

I, Geo. W. Bates, being first duly sworn, depose and say I am one of the sureties named in the foregoing bond; that I am a resident and freeholder within said District, and that I am worth in property situated therein the sum of one hundred and twenty thousand dollars, exclusive of property exempt from execution.

GEO. W. BATES.

Subscribed and sworn to before me this 4th day of August, 1896.

[Seal]

P. I. WILLIS,
Notary Public for Oregon.

United States of America, }
District of Oregon. } ss

I, Robt. Wakefield, being first duly sworn, depose and say I am one of the sureties named in the foregoing bond; that I am a resident and freeholder within said District, and that I am worth in property situated therein the sum of fifty thousand dollars, exclusive of property exempt from execution.

ROBT. WAKEFIELD.

Subscribed and sworn to before me this 4th day of August, 1896.

P. L. WILLIS,
Notary Public for Oregon.

Approved:

CHARLES B. BEWINGER,
Judge.

[Endorsed]: Filed August 4th, 1896. **J. A. Sladen,** Clerk.

- [165] And afterwards, to-wit, on Wednesday, the 19th day of August, 1896, the same being the 111th judicial day of the regular April term of said Court—Present, the Honorable CHARLES B. BELLINGER United States District Judge presiding—the following proceedings were had in said case, to-wit

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix.

No. 2204.

Order Extending Time to File Transcript.

August 19, 1896.

Now, at this day, on motion of Mr. Rufus Mallory, of counsel for the defendant herein,

It is ordered that the time heretofore allowed by this Court in which to file the transcript of record in this cause, in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, be, and the same is hereby, extended to, and including, Monday, the fifth day of October, A. D. 1896.

CHARLES B. BELLINGER,

Judge.

- [166] And afterwards, to wit, on the 17th day of September, 1896, there was duly filed in said Court a stipulation as to evidence, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon

JOHN McMULLEN,

Complainant.

vs.

JULIA E. HOFFMAN, Executrix,

Defendant.

Stipulation as to Evidence.

The parties to this suit, by their counsel, stipulate and agree as follows:

1st. That prior to the sixth day of March, 1893, the city of Portland, through its water committee, advertised for bids for

the construction of a system of waterworks for conveying the water of Bull Run river to the city of Portland, the work to be bid for in several classes.

2nd. That for manufacturing and laying steel pipe for conveying water from the head works at Bull Run to Mount Tabor Lee Hoffman, the original defendant in this suit, doing business under the name of Hoffman & Bates, was a bidder, and the lowest bidder, and the contract for performing that portion of the work was awarded to him.

37] 3rd. That on the tenth day of March, 1893, a contract was entered into between the said Hoffman and the water committee, Hoffman acting in the name of Hoffman & Bates, whereby said Hoffman undertook and promised to furnish all the material and labor for constructing and completing said pipe line from the head works at Bull Run to Mount Tabor, according to certain specifications which were attached to and made a part of said contract, and to turn the same over completed to the city of Portland, in consideration whereof the city of Portland agreed to pay the sum of \$465,667.00. The city, however, reserved the right to make any changes in the specifications it thought proper, the pay for the work to be increased or diminished as the change increased or diminished the cost of the work. Payments were to be made as the work progressed, monthly estimates to be made by the city engineer and ninety per cent of the amount earned under the contract in any one month was to be paid by the 20th day of the following month. It was further provided by the said specifications that said Hoffman should turn said work over to the city when completed, and should keep the same in thorough repair and guarantee the city against all loss, costs or damages from breaks or leaks for a period of six months after the water should have been running full pressure through the whole length of said pipe, and in case said Hoffman failed in this, the city reserved the right to do the work and deduct the costs from the money retained in the hands of the city, and that when the said work was finally accepted the whole amount then due for said work should be paid.

8] 4th. That the work of furnishing the material, constructing and laying said pipe as provided for by said contract, and of doing such extra work and furnishing such extra materials as

were required by said city was completed and water was turned full pressure through said pipe about the first day of January, 1895.

5th. That payments were made to said Hoffman in monthly payments as provided in said contract.

6th. That the total sum earned under said contract and the extra work required by and allowed for by the city is, viz: Under the contract \$509,825.22 extra work not under contract \$14,496.74; making a total earned and allowed, \$524,321.96.

7th. That at the time of the commencement of this suit there were in the hands of the city earned and due for said work the following sums, viz: 10 per cent retained as per contract \$50,982.52; extra work allowed \$2,263.43; making a total of \$53,245.95.

8th. That during the progress of said work a store was kept, laborers were boarded, from which and other sources a profit was realized amounting to \$15,339.76, making the total amount paid, added to the amount earned, allowed and unpaid, \$539,661.72.

9th. That the total cost of said works, as shown by the books kept by said Hoffman, was \$434,622.13, showing a net profit of \$105,039.59.

[169] 10th. That said Hoffman claimed to have performed other extra work and furnished other materials for which he claimed compensation, but which said committee rejected and refused to allow. That the amount so claimed and rejected by the city is about \$17,000.00, which claim was unsettled at the time this suit was commenced.

11th. That the work of manufacturing said pipe and of conveying the same from the place of manufacture to the place of use was sublet by said Hoffman, the former to Wolff, Zwicker & Buehner, and the latter to Cook & Kiernan, and it was provided in the contract of subletting that the subcontractors should be paid for their work by Hoffman as allowance, and payment was made to him by the city of Portland.

12th. That said Hoffman drew from the money earned on said work as his salary as general superintendent and manager the sum of eight thousand dollars on December 30, 1893, and the sum of \$12,000.00 on September 30, 1894 (being the full amount claimed for the year 1894), and entered the same on his

books of account, kept in connection with the said work, as a part of the expense of executing said contract with the city.

13th. That the books of account kept by Hoffman in connection with the work show credits to the San Francisco Bridge Company of June 30, \$983.05, July 31, \$1,333.84, making a total of \$2,316.89.

14th. That prior to June 30, 1893, said Hoffman had contributed toward the work the sum of \$3,100.27, which was entered to his credit on the books of account on said day, and thereafter he advanced toward the prosecution of said work at various dates between June 30 and September 30, 1893, divers other sums of money, viz:

June 30,	\$ 29.75
“ “	72.90
July 1,	7,000.00
July 28,	5,000 00
July 31,	3.64
July 31,	800.88
Aug. 31.	1,550.44
Sept. 30,	104.00

The total of all advances to October 1 being \$17,609.91.

All of said sums were placed to the credit of said Hoffman on the dates stated. That thereafter divers small sums of money were advanced by said Hoffman and divers amounts drawn by him against the same his books carrying the following monthly balances of credits in his favor, viz:

1893

November 1,	\$17,629.16
December 1,	17,661.66

1894

January 1,	14,763.22
February 1,	14,763.22
March 1,	14,791.72
April 1,	14,791.72
May 1,	14,807.72
June 1,	15,628.72
July 1,	15,631.00
September 1,	15,663.30

On September 30, 1894, said last-mentioned sum was drawn by said Hoffman.

Julia E. Hoffman, Executrix, etc.

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15th. That the sums of money on hand to the credit of said work on the first day of each month from August 1, 1893, to and inclusive of August 1, 1895, are as follows, to-wit.

August 1,	\$ 5,259.20
September 1,	14,130.95
October 1,	28,175.58
November 1,	34,663.04
December 1,	36,502.29

1894

January 1,	37,791.10
January 1,	37,791.10
February 1,	32,793.43
March 1,	29,703.33
April 1,	29,343.89
May 1,	24,201.72
June 1,	37,146.62
July 1,	51,938.23
August 1,	54,573.52
September 1,	54,077.61
October 1,	74,240.10
November 1,	66,918.50
December 1,	57,108.63

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1895.

January 1,	80,524.85
February 1,	66,180.13
March 1,	6,013.94
April 1,	5,712.07
May 1,	4,307.11

1895.

June 1,	64,286.61
July 1,	24,112.06
August 1,	13,882.66

That all bills outstanding against said work were paid during each month, and the sums sets forth above represent net balances on hand after the bills of the preceding months had been paid.

16th. That on September 1, 1893, there was to the credit of Hoffman & Bates the sum of \$14,130.95, and the amounts payable during the month subject to the recitals in the 11th paragraph of this stipulation were as follows:

Pay roll for August.....	\$11,982.40
General accounts	1,198.34
Audited vouchers	9,737.68
Wolff, Zwicker & Buehner	24,741.37
Cook & Kiernan	5,102.43

\$52,762.22

That the city paid on the 20th of September \$66,806.58.

That the estimates for August, ninety per cent of which were due and payable September 20, were \$74,229.83.

That all outstanding demands Sept. 20, 1893, to-wit, \$52,762.22, were paid.

17th. That said Hoffman and defendant, after his decease, drew personally from the sums of money to the credit of said work in addition to the sum of \$15,663.30, drawn September 30, 1894, to repay advances and the sum of \$8,000, drawn Dec. 30, 1893, on account of salary and the sum of \$12,000, drawn Sept. 30, 1894, on account of salary, the following sums at the dates stated, to-wit:

1895.

Jan. 31,	\$ 8,855.04
June 17,	40,000.00
July 1,	10,000.00
Aug. 5,	13,882.66

\$72,737.70

That he has not accounted to or paid defendant any part of said amount.

18th. That nothing contained in this stipulation and especially in the second and third paragraphs or either thereof, shall be deemed a waiver in any degree of the claim made by the complainant that the bid made by Hoffman was on behalf of [74] himself and complainant jointly, and that the contract entered into with the city of Portland by Hoffman was in the joint interest of himself and complainant.

19th. It is understood and agreed that the foregoing stipulations are to take the place of plaintiff's exhibits numbered respectively from No. 2 to No. 14 and No. 17 to No. 21, both inclusive, Nos. 27 and 28.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

DOLPH, MALLORY & SIMON,
Solicitors for Defendant.

[Endorsed]: Filed September 17, 1896. J. A. Sladen, Clerk

And afterwards, to-wit, on the 19th day of September, 1896, there was duly filed in said court, a petition of John McMullen for an appeal, and assignment of errors in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Last
Will of Lee Hoffman, Deceased,

Defendant.

Petition of John McMullen for Appeal and Assignment of Errors.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

[175] Your petitioner, John McMullen complainant in the above-entitled cause, submits this his petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree rendered and entered in the above-entitled court and cause on the 23rd day of June, 1896, or from so much of said decree as is hereinafter specified, and thereupon your petitioner respectfully represents that he is complainant in the above-entitled cause; that in and by his bill of complaint filed therein he sought a decree of the above-entitled Honorable Court declaring a partnership to have been formed between himself and one Lee Hoffman on the 6th day of March, 1893, for performing a contract entered into between said Hoffman on behalf of himself and the complainant, with the city of Portland, Oregon, acting through its water committee, on the 10th day of March, 1893, for manufacturing and laying steel pipe from a point known as "headworks" to a point known as "Mount Tabor" on the system of waterworks which the said city of Portland was then about to have constructed, and for a finding in said decree that said partnership between the complainant and said Lee Hoffman had continued through the execution of said work, and that in accordance with the

provisions of said partnership agreement the complainant was entitled to share with said Lee Hoffman the profits realized upon the execution of said work; and it was further sought in and by said bill of complaint and in and by said decree to have an accounting of the business of said copartnership, including certain extra work done in connection with said contract between said Lee Hoffman and the city of Portland, for the purpose of bringing water to said city by means of said system of waterworks, as was provided and contemplated in the contract between the complainant and said Lee Hoffman and also to have an accounting for certain moneys realized by said Lee Hoffman from other sources in connection with said work, to-wit, from a supply store, and a boarding camp, and certain livestock, plant, etc.; and to secure a decree determining said partnership and requiring the payment of such moneys as should be awarded the complainant, and for general relief; and complainant further represents that process was duly served upon the defendant in said suit, Lee Hoffman, and that thereupon he appeared in court and answered said bill; that the complainant filed exceptions to the answer, and, pending the determination of the Court upon said exceptions, said Lee Hoffman died, leaving a will, whereof the above-named defendant, Julia E. Hoffman, was appointed executrix, and upon application duly made she, as such executrix, was substituted as defendant for the said Lee Hoffman in said suit, and said suit was revived. The exceptions filed by the complainant to the answer of the defendant were duly argued by counsel, and were in part sustained and in part overruled by the Court, and thereupon the complainant filed amendments to his bill and a general replication to the answer, and the cause was referred to an examiner of the above-entitled court for the purpose of taking the proofs, and the cause was afterwards heard upon said proofs and arguments of counsel, and a decree was on the 23rd day of June, 1896, rendered in favor of the complainant and against the defendant, finding, among other things, that there had been earned as profit on the execution of the contract and work above mentioned the sum of \$105,039.59, whereof one-half, or the sum of \$52,519.80, belonged to the complainant, and the costs of suit having been ordered by the Court to be paid out of a common fund, judgment was awarded in favor of

the complainant and against the defendant for the sum of \$52,241.18.

Your petitioner now prays that an order may be made allowing him to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the said decree, or from so much thereof as limits the amount of money to which the complainant is entitled to the said sum of \$52,241.18; and thereabout your petitioner shows to the Court that he is advised by counsel, and charges the fact so to be, that there was error in the above-entitled court, committed in the decree rendered, in the following particulars, which your petitioner respectfully submits and charges as his assignment of error on this appeal.

Assignment of Errors.

First. Your petitioner respectfully submits that the court erred in making its finding of fact No. 7, the same being as follows, to-wit:

"7. That the sum of one thousand dollars per month for the period of twenty months, to-wit, from the first day of May, 1893, to the first day of January, 1895, as charged and drawn by said Lee Hoffman is proper compensation for his services for superintending said work, and the same is hereby allowed as a charge against the joint account in the settlement between the parties to this suit."

[178] And your petitioner alleges that the evidence in said cause does not support the finding and determination of the Court that the sum of \$1,000 per month for the period of twenty months, as stated in said finding, was proper compensation for the services of said Lee Hoffman for superintending said work, and alleges that the sum of \$400 per month, and no greater amount, during said time is proper compensation for his said services, the same to be charged against the joint account in the settlement between the parties to the suit.

Second. That the Court erred in making the eighth finding of fact set forth in said decree, to-wit:

"8. That a full and true statement of the account between the parties hereto touching the work, material, and operations above mentioned and the moneys earned thereon, and showing

the moneys which the complainant is now entitled to recover from the defendant is as follows, to-wit:

Total allowed and received from

the city of Portland,

On Contract\$509,825.22

For Extra Work 14,496.74

\$524,321.96

Profits of camp, store, sale of live-

stock, interest, etc.....

15,339.76

Grand Total

\$539,661.72

Total gross cost of work, including

salary of \$20,000 to Lee Hoffman.....

434,622.13

Balance.....

\$105,039.59

[179] Amount retained by the city of Port-

land, on account of contract\$ 50,982.52

On account of extra work 2,263.43

53,245.95

Less amount paid to Wolff, Zwicker

& Buehner

18,627.17

Now held by city of Portland.....

\$ 34,618.78

Amounts drawn out by Lee Hoffman

and defendant.....

72,737.70

107,356.48

Amount to be paid to San Francisco

Bridge Co.....

2,316.89

Balance as above.....

\$105,039.59

One-half thereof owing complainant..

\$52,519.80"

That a full and true statement of the account between the parties hereto touching the work, material and operations above mentioned and the moneys earned thereon, and showing the moneys which the complainant is now entitled to recover from the defendant, is as follows, to-wit:

Total allowed and received from city of Portland.....	\$509,825.22	
For extra work	14,496.74	
		524,321.96
Profits of camp, store, sale of livestock, interest, etc		15,339.76
		<hr/> \$539,661.72
[180] Total gross cost of work, including salary of \$8,000 to Lee Hoffman		422,622.13
Balance.....		<hr/> \$117,039.59
A. C. F.....		117,039.59
Amount retained by city of Portland, on account of contract.....	\$ 50,982.52	
On account of extra work.....	2,263.43	
	<hr/>	53,245.95
Less amount paid Wolff, Zwicker & Buehner.....		18,627.17
		<hr/>
Now held by city of Portland.....		\$ 34,618.78
Amounts drawn out by Lee Hoffman and defendant.....		84,737.70
		<hr/> 119,356.48
Amount to be paid to San Francisco Bridge Co.....		2,316.89
		<hr/>
Balance as above.....		\$117,039.59
One-half thereof owing complainant...		58,519.80
Interest owing complainant at the rate of 8 per cent per annum to June 23, 1896, date of decree, as below.		
Interest on half of \$4,800, excess drawn for salary on December 30, 1893, from said date.....		476.80
[181] Interest on half of \$7,200, excess drawn for salary on September 30, 1894, from said date.....		498.40

Interest on half of \$8,855.04 drawn January 31, 1895.	494.91
Interest on half of \$40,000, drawn June 17, 1895.	1,628.66
Interest on half of \$10,000, drawn July 15, 1895.	375.51
Interest on half of \$13,882.66 drawn August 5, 1895.	490.45
Interest on \$2,316.89, advanced by complainant to December 30, 1893..	83.80
	<hr/>
	\$ 62,566.33
A. C. F.	62,566.33
Less interest on \$17,609.91 advanced by Lee Hoffman from the several dates of advances to November 1, 1893.	419.14
	<hr/>
	\$ 62,147.19

3rd. That the Court erred in decreeing that the costs of suit should be paid out of the common fund, and in not awarding to complainant judgment against defendant for his costs of suit.

[32] 4th. That the Court erred in the decree rendered wherein it was found and adjudged that the complainant recover judgment against the defendant for the sum of \$52,241.18, and that the Court should have found and adjudged that the complainant recover from the defendant the sum of \$62,147.19 and costs of suit.

Wherefore, the above-named complainant prays that the judgment and decree rendered by the above-entitled Circuit Court of the United States for the District of Oregon may be reversed or modified by the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that the complainant may have a decree in this cause awarding him a judgment against the defendant for the said sum of \$62,147.19, or such sum as the said United States Circuit Court of Appeals shall deem him to be equitable entitled to recover from the defendant, together with his costs of suit, and that the said Circuit

Court of the United States for the District of Oregon shall be directed to enter a decree in favor of the complainant in conformity with the decree and mandate of the said United States Circuit Court of Appeals.

COX, COTTON, TEAL & MINOR,
Solicitors for Complainant.

Service by copy admitted at Portland, September 19, 1896.

RUFUS MALLORY,
Of Solicitors for Defendant.

[Endorsed]: Filed September 19, 1896. J. A. Sladen, Clerk.

[183] And afterwards, to-wit, on Saturday, the 19th day of September, 1896, the same being the 138th Judicial day of the regular April term of said court—Present, the Honorable Charles B. Bellinger, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Last
Will of Lee Hoffman, Deceased,

Defendant.

Order Allowing Appeal of John McMullen.

The above-named complainant, John McMullen, having filed a petition in this court for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree rendered in this court and cause on the 23rd day of June, 1896, and the court having duly considered said petition, it is

Ordered that the appeal be allowed as prayed for upon the said complainant and appellant executing to the defendant and respondent a bond in the penal sum of one thousand

(\$1,000.00) dollars, with sureties to be approved by this Court.
Dated this 19th day of September, 1896.

CHARLES B. BELLINGER,
Judge.

[184] [Endorsed]: Filed September 19, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on the 19th day of September, 1896, there was duly filed in said court a bond on appeal of John McMullen, in words and figures as follows, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Last
Will of Lee Hoffman, Deceased,

Defendant.

Bond on Appeal of John McMullen.

[185] Know All Men by These Presents, that we, John McMullen and Robert Wakefield, are held and firmly bound unto Julia E. Hoffman, executrix of the last will of Lee Hoffman, deceased, in the sum of one thousand (\$1,000.00) dollars, to be paid to the said Julia E. Hoffman, executrix, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of September, 1896.

The condition of this obligation is such that,

Whereas, the above-named John McMullen has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse or modify the decree rendered in the above-entitled suit—

Now, therefore, the condition of this obligation is such that if the above-named John McMullen shall prosecute said ap-

peal to effect and answer all damages and costs, if he should fail to make the said appeal good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

JOHN McMULLEN, [Seal]
By L. B. COX, His Attorney.
ROBERT WAKEFIELD. [Seal]

State of Oregon, }
Multnomah County. } ss.

Robert Wakefield, being first duly sworn, deposes and says that he is a resident and householder within the State and district of Oregon; that he is worth the sum of two thousand (\$2,000.00) dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

ROBERT WAKEFIELD,

[186] Subscribed and sworn to before me this 19th day of September, 1896.

[Seal]

ROBERT R. REID, Jr.
Notary Public in and for Oregon.

The foregoing bond is approved this 19th day of September, 1896.

CHARLES B. BELLINGER,
Judge.

[Endorsed]: Filed September 19, 1896. J. A. Sladen, Clerk.

And afterwards, to-wit, on Tuesday, the 29th day of September, 1896, the same being the 146th Judicial day of the regular April term of said court—Present, the Honorable Charles B. Bellinger, United States District Judge presiding—the following proceedings were had in said case, to-wit:

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix

} No. 2204.

Order Extending Time to File Transcript.

[187]

September 29, 1896.

Now at this day, on motion of Mr. Rufus Mallory, of counsel for the defendant herein, it is ordered that the time heretofore allowed the said defendant in which to file the transcript of record in this cause on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended ten days.

CHARLES B. BELLINGER,

Judge.

[Endorsed]: Filed September 29, 1896. J. A. Sladen, Clerk.

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of Lee Hoffman, Deceased,

Complainant,

Defendant.

Stipulation as to Taking of Depositions.

[188] It is hereby stipulated and agreed that the depositions of George W. Catt and Henry S. Wood as witnesses on the part of the complainant in the above-entitled cause, may be taken before T. T. Daniels, Esq., a notary public in and for the city and county of New York, in the State of New York, at his office No. 29 Wall street, upon the interrogatories and cross-interrogatories hereto attached, the same when so taken, reduced to

Julia E. Hoffman, Executrix, etc.

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writing and duly certified to be received in evidence upon the trial of this cause, subject to all objections to be then taken as to materiality, relevancy, or competency.

Dated this 30th day of January, 1896.

L. B. COX,
Of Counsel for Complainant.
RUFUS MALLORY,
Of Counsel for Defendant.

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of J. E. Hoffman, Deceased,

Defendant.

Interrogatories to George W. Catts.

[189]

Counsel for complainant in the above-entitled cause, subject to the ruling of the Court upon the evidence introduced by the defendant touching matters in controversy herein which transpired prior to the execution of the contract, complainant's Ex. No. 1, propounds these questions to the witness George W. Catt.

Interrogatory 1. State your name, age, residence, and occupation.

Interrogatory 2. What connection, if any, have you with the San Francisco Bridge Company of San Francisco, California, and how long has your relationship with that company existed?

Interrogatory 3. State whether or not you have any information in regard to the San Francisco Bridge Company or Mr. John McMullen, its general manager, bidding on certain work let by the water committee of the city of Portland, Oregon, on

the first day of March, 1893, for the purpose of bringing Bull Run water to the city of Portland.

Interrogatory 4. State what, if anything, you had to do with preparing any estimates or securing any information or data which were to be used for forming an estimate as to that portion of the work which was let as a separate item under the head of "manufacturing and laying steel pipe from the headworks to Mt. Tabor." State generally and fully what you did in this connection.

Interrogatory 5. I show you herewith a copy of a paper which has been introduced in evidence by the defendant, marked [90] "Defendant's Ex. Y2, G. A. B. Ex.," the original of which purports to be a compilation of figures made by you touching the work last referred to, and will ask if you recognize this as a compilation prepared by yourself.

Interrogatory 6. If you shall answer the foregoing interrogatory in the affirmative, I will ask you to state what said compilation was designed to cover, that is to say, whether it was your purpose that it should be used as prepared as the basis of a bid on said work, or whether it related to your estimate as to the cost for which the work should be done only.

Interrogatory 7. Please state what you did, or were required to do by the San Francisco Bridge Company or by Mr. McMullen, in connection with this work referred to, and what any reports rendered by you to the San Francisco Bridge Company or to McMullen were designed to cover, and what office they were designed to perform.

Interrogatory 8. I show you another paper consisting of three pages which is a copy of another document which purports to be a copy made by one H. D. Bush of certain computations made by you in connection with this same work. This paper is marked "W2, W2 page 2, and W2 page 3." State whether or not this is a copy of any computation you may have made in connection with this work and if so, what the purpose of the computation was and what office it was designed to fill.

Interrogatory 9. State fully what, if anything, you did in aid of the execution of the work of manufacturing and laying [91] steel pipe from the headworks on Bull Run to Mt. Tabor after

the contract therefor between the water committee and Hoffman had been entered into, and at whose instance you acted

L. B. COX,

Of Counsel for Complainant.

No cross-examination.

DOLPH, MALLORY & SIMON,

Atty's for Deft.

Copy of Catt's Estimate on Plant—Bull Run. W.2.

For 20 sections 30 ft. long—120 sheets per day.

4 punches	8,000
2 Planers	3,000
2 Bending Rolls (each bend 6 plates per hour).....	3,000
12 Yale and Towne Cranes	3,000
3 Riveters complete with Pumps, cranes, etc. (to run night and day).....	16,000
2 Forges	100
1 Small Punch and Shear	1,500
1 Drill Press	200
1 Lathe	200
Shafting	1,000
Car Track and Overhead Tramway	1,200
Engine	2,000
Boilers	3,000
Electric Light	1,000
Incidentals	1,000

44,200

Transportation to Portland 5,000 |

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Dipping plant 3,000 |

Hoisting Engine for same.. .. 5,000 |

Shop Buildings 10,000 |

67,200

Bull Run.

W.2 p.2

Catt's Estimate of Cost of Riveted Pipe, 20 sections—
about 50,000 lbs. per day.

Total men to operate tools, to deliver the pipe per day
ready for calking, 60 @ \$2.50 per day average...150.00
Coal and Oil 25.00 |

Cost of rivets over price paid for finished pipe	60.00
Engineer and fireman	15.00
Shops, Superintendents and Supplies per day	50.00

Making a total per day of	300.00	
		per pound
\$300 per day for 50,000 lbs.—per pound for pipe ready for calking .....		.006
Calking .....		.0005
Dipping and Testing .....		.0015
Contribution toward cost of plant	\$36000.00	.003
Superintendence and incidentals	\$18000.00	.0015
Making a total of .....		.0125
Riveting on field .....		.002
Hauling .....		.0025
Profits	\$80500.00	.007
Or bid for pipe in the ditch .....		.024
3] We did bid .....		.0275

Bull Run Pipe Line

W2, page 3

Copy of Catt's Estimate for Manufacture and Laying.

	Catt's Prices	Estimate Amounts
Plates 11442000 lbs.		
Rivets 340000		
Manuf. and laying 11782000 lbs@.	\$.024	\$282768.00
Manholes 255 @	30.000	7500.00
Air Valves 34 @	10.000	340.00
Bends Extra Joints 200@	20.000	4000.00
Blow-offs with 6" valves 46	10.000	460.00
Waste Pipes 6" 29,000 lbs .....	.060	1740.00
Brick laid in cement 580 M	16.00	9280.00

Two Stand Pipes.

Plates	15,000 lbs.	.060	900.00
Water Gates 36"	1	75.000	75.00
Water Gates 33"	1	75.000	75.00

Julia E. Hoffman, Executrix, etc.

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Water Gates 30"	2	75.000	150.00
Waste Pipe 30"	40,000 lbs.	.060	2400.00
Foundation Concrete	60 yds.	12,000	720.00

Sleeve Joints.

Wr't Iron—7	7000 lbs.	.100	700.00
Lead	3000 lbs.	.060	180.00

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Trestles.

Wr't Iron	7000 lbs.	.060	2400.00
Concrete	400 yds.	12.00	4800.00
Total without Excavation			318,638.00

Excavation and Refilling.

Earth	270,000 yds.	.33 1-3	90000.00
Loose Rock	10,000 yds.	.500	5000.00
Solid Rock	2,000 yds.	1.200	2400.00

 97400.00

 Grand Total.....\$416038.00

BID "D.D.D."

Ex. Y. 2.

Manufacturing and Laying.

G.A.B. Ex.

28	{Steel, 11,442,000 } {Rivets 340,000}	11,782,000	\$.024	\$282,768.00	
29	Manholes.....	255	30.00	7,650.00	
30	Air Valves.....	34	10.00	340.00	
31	Bends, extra joints..	200	20.00	4,000.00	
32	Blow-offs, with 6-inch valves.....	46	10.00	460.00	
33	Waste Pipes, 6-inch.	29,000	.06	1,740.00	
33½	Brick laid in cement	580,000	16.00	9,280.00	\$306,238.00
34	Steel Plates.....	15,000	.06	900.00	
35	Water Valves, 36-in.	1	75.00	75.00	
36	Water Valves, 33-in.	1	75.00	75.00	
37	Water Valves, 30-in.	2	75.00	150.00	
38	Waste Pipe, 30-in..	40,000	.06	2,400.00	
39	Foundations—				
	Concrete or cement	.60	12.00	720.00	4,320.00
[195] 40	Wrt. iron sleeves..	7,000	.10	700.00	
41	Lead.....	3,000	.06	180.00	880.00
42	Wrought iron	40,000	.06	2,400.00	
43	Foundat'ns, concrete	400	12.00	4,800.00	7,200.00
44	Earth.....	270,000	.33½	90,000.00	
45	Loose Rock.....	10,000	.50	5,000.00	
46	Solid Rock.....	2,000	1.20	2,400.00	97,400.00
Total cost Bid "D.D.D."					\$416,038.00

Julia E. Hoffman, Executrix, etc.

139

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of Lee Hoffman, Deceased,

Defendant.

Interrogatories to Henry S. Wood.

Subject to the ruling noted above as to evidence offered by the defendant touching matters connected with the subject of this suit which occurred prior to the execution of the contract, Complainant's Ex. No. 1, the complainant addresses these inquiries to the witness Henry S. Wood.

[196]

Interrogatory 1. State your name, age, residence and occupation.

Interrogatory 2. What connection have you, if any, with the San Francisco Bridge Company of San Francisco, California, and if you have such connection, how long has it continued?

Interrogatory 3. Do you know anything about the letting to bids by the water committee of the city of Portland, Oregon, of the work of bringing Bull Run water to that city on the first day of March, 1893?

Interrogatory 4. If your answer the last interrogatory in the affirmative, I will ask you to state what, if anything, you had to do in connection with said letting and on whose behalf, or at whose instance, you performed whatever service you may have performed. State fully just what you did.

Interrogatory 5. I show you a paper of two pages marked Defendant's Ex. U2 and V2, which has been offered in evidence as a copy of a copy of a computation made by you in connection with this work, and ask if you recognize this as any computation of your own.

Interrogatory 6. If you answer the last interrogatory in the affirmative, I will ask you to state what the purpose of this computation was, that is to say, whether it was designed for

a bid on any portion of the work or as an estimate of the cost price of doing the work.

Interrogatory 7. State who, if any one, was engaged in gathering information and compiling the same for the San Francisco Bridge Company, or John McMullen, its general manager, touching the manufacture and laying the steel pipe on this water system from the head works to Mt. Tabor.

Interrogatory 8. In connection with the matters covered by the preceding interrogatory, I will ask you to state whether or not any bid for this portion of the work was prepared or agreed upon in form to be submitted by the San Francisco Bridge Company or McMullen prior to the visit of the latter to Portland, shortly before the letting took place.

Interrogatory 9. State what the proposition was in connection with this bidding upon which you were engaged in San Francisco as to a bid which was to be submitted by San Francisco Bridge Company or McMullen in connection with Lee Hoffman, that is to say, the manner in which they were to bid upon the work.

Interrogatory 10. State fully what, if anything, you did in aid of the execution of the work of manufacturing and laying steel pipe from the head works on Bull Run to Mt. Tabor after the contract therefor between the water committee and Hoffman had been entered into, and at whose instance you acted

L. B. COX,

Of Counsel for Complainant.

No cross-examination.

DOLPH, MALLORY & SIMON,

Att'y for Defendant.

11945

Ex. U 2

PORTLAND WATER WORKS.

Bid "A"—Head Works.

	RATES		Cost	TOTAL COST	PROFIT	BID
	Cost	Bid				
Clearing and grubbing 2 acres, at	\$125	\$	250	\$ 550	\$ 55	605
Trees cut—100 trees	3	.....	300	.....	.....	.....
Excavations:						
Earth—3,000 cubic yards, at .....	.50	.....	1,500	.....	.....	.....
Loose rock—1,000 cubic yards, at	1.50	.....	1,500	.....	.....	.....
Solid rock—7,000 cubic yards, at	1.50	.....	10,500	.....	.....	.....
Rock under water—100 cubic yards, at	10.00	.....	1,000	14,500	1,450	15,950
				15,050	1,505	16,555

Bid "A" [See Act. No. 7 Spec.] certified check No. 850 to 1200.

Bid "B"—for Wrought Iron:

Wrought iron, 11,442,000 lbs., F. O. B. Mill, at .....	\$	.02	\$228,840	\$	.....	.....
Freight on " " at .....		.0107	122,429	.....	.....	.....
Inspection, insurance and inc., at .....		.....	731	352,000	352,000	387,200
				.....	.....	387,200

Bid "B" [See. Act. No. 7 Specif.] certified check \$19,500 to \$22,000.

Bid "C"—Manufacturing and Laying:

Receipt and storage 11,442,000 lbs. at .....	\$	.0005	\$ 5,721	\$	.....	.....
Insurance, rejections, inc. at .....		.0005	5,721	.....	.....	.....
Plant, assumed cost for 25 lengths per day, at .....		.0005	28,905	.....	.....	.....
Pay-roll—punch, bend, riv. and caulk, at .....		.00375	42,908	.....	.....	.....
Fuel, Oil—supplies, at .....		.0005	5,721	.....	.....	.....
Dipping, " " labor, at .....		.002	22,864	.....	.....	.....
Dipping, 2 coats—material, at .....		.0005	5,721	.....	.....	.....
Testing (25 lengths per day), at .....		.00125	14,303	.....	.....	.....
Transportation to trench, at .....		.003	34,326	.....	.....	.....
Laying and riveting, at .....		.0025	28,005	.....	.....	.....
				194,515	19,450	213,965

Total iron, 1,144,200 lbs., fin. on ditch, per lb. 1.87

Rivets, 342,000 lbs., at per lb.	\$ 3.9	\$	13,338	\$ 13,338	\$ 1,334	\$ 14,672
Manholes, 225, at each.	20	.....	4,500	4,500	450	4,950
Air valves (4 inches), 54, at each.	10	.....	540	540	54	594
Bends, extra joints 200, at each.	30	.....	6,000	6,000	600	6,600
Blow-offs (with 6-inch valves), 46, at each.	10	.....	460	.....	.....	.....
Waste pipes, 23,000 lbs. (labor only), at per lb.	.02	.....	580	.....	.....	.....
Waste pipes, 580 lbs., brick in cem., per lb.	16	.....	9,280	10,320	1,082	11,362
Two-stand pipes, labor on 15,000 lbs., at.	\$.02	\$	300	\$	\$	\$
Four gates, at each.	.150	.....	600	.....	.....	.....
Labor on 40,000 lbs., at per lb.	.02	.....	800	.....	.....	.....
Concrete, 60 yds., at.	10	.....	600	2,310	230	2,530
Sleeve joints—7,000 lbs. wrought iron, at per lb.	.06	.....	420	.....	.....	.....
3,000 lbs. lead, at per lb.	.06	.....	180	600	60	680
Trestles (all cast) of 40,000 lbs. wrought iron, at per lb.	.06	.....	2,400	.....	.....	.....
400 yds. concrete, at per yd.	10	.....	4,000	6,400	640	7,040
Total for all but excavating and refilling.	\$ 2.085	\$2,293	\$238,513	\$238,513	\$23,850	\$262,363

PORTLAND WATER WORKS.

Bid "C" Continued.—Mfg. and Laying.

	Rates		Cost	Bid	Cost	Profit	Bid
	\$	\$				\$	\$
Br. forward [all est. but Excav. Refill].....							\$262,283
Excav. and Refilling.....				.33	81,000		
Earth, 270,000 yards, at.....		.30		1.65	15,000		
Loose Rock, 10,000 yards, at.....		2.00		2.20	4,000	100,000	110,000
Solid Rock, 2,000 yards, at.....					100,000		
					338,513	38,850	372,363
Total bid "C" [see act. No. 7 spec.].....		2,958		3.255			
Certified check \$19,000 to \$22,000							

Bid "E"—Cast I. Mt. Labor to City Park.

	Cost	Bid	Cost	Profit	Bid
	\$	\$	\$	\$	\$
Cast Pipe—6,300 [short] tons at Fon. Fast.....	21.50		135,458		
6,300 [short] tons Ins. and Frt.....	8.50		53,550		
6,300 [short] tons, local handlings.....					207,900
Laying and etc., 6,300 [short] tons jointing.....	10.00		63,000	18,900	69,300
Manholes, 15, 30,000 lbs., at lb.....	.04		1,200	6,300	1,320
Blowoffs, 6 blowoffs, 1,200 lbs., at.....	.06		780	120	
6 Wt. I. wastes, 1,200 lbs., at.....	150.00		900		2,211
6 Water valves, 5 at.....	10.00		50	10	110
Air valves [4 inches] 10 at.....	.04		40	80	880
Bends—Cast iron, 20,000 lbs., at.....					
Excav. and refilling.....					
Earth, 40,000 yards, at.....	.30		12,000		13,200
Loose rock, 4,000 yards, at.....	1.50		6,000	600	6,600
Solid rock, 1,000 yards, at.....	2.00		2,000	200	2,200
Excav. Solid, per ton.....				27,611	308,721
Bid "E" [see Act. No. 7, spec.].....	43.82	48.20			
Certified check 15,500 to 17,000					

[202] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of Lee Hoffman, Deceased,

Defendant.

Depositions.

Of HENRY S. WOOD and GEORGE W. CATT, as witnesses on the part of the complainant in the above-entitled cause, taken before me, Thomas F. Daniels, a notary Public in and for the city and county of New York, in the state of New York, at my office No. 29 Wall street, pursuant to the annexed stipulation, to be read as evidence on behalf of the complainant on the trial of the above-entitled cause, said depositions being taken by me at the times stated in said depositions.

Deposition of Henry S. Wood.

In the case in equity of John McMullen vs. Julia Hoffman, executrix of the will of Lee Hoffman, deceased, in the Circuit Court of the United States for the District of Oregon.

[203] Deposition taken before T. F. Daniels, Esq., N. P. in and for the city and county of New York, state of New York, at his office at 29 Wall St., this seventh day of February, 1896.

Interrogatory 1. State your name, age, residence and occupation.

Answer 1. Henry S. Wood, age 35; residence. Belvedere, Marin Co., Cal.; occupation, civil engineer.

Interrogatory 2. What connection have you, if any, with the San Francisco Bridge Co. of San Francisco, California, and if you have such connection how long has it continued?

Answer 2. I have been estimating and designing engineer for the above company, which position I have held since September, 1887, up to the present time.

Interrogatory 3. Do you know anything about the letting to bids by the water committee of the city of Portland, Oregon, of

the work of bringing Bull Run water to that city on the first day of March, 1893?

Answer 3. I do.

Interrogatory 4. If you answer the last interrogatory in the affirmative, I will ask you to state what, if anything, you had to do in connection with said letting and on whose behalf or at whose instance, you performed whatever service you may have performed? State fully just what you did.

Answer 4. On behalf and at the instance of John McMullen, president of the San Francisco Bridge Co., and Lee Hoffman, I made several estimates and inquiries concerning the cost of the different items on the Bull Run waterworks contract prior to the letting of said contract as above mentioned. In this connection I interviewed all people possessed of special information, who seemed available, in the city of San Francisco, such as Hermann Schussler, chief engineer of the Spring Valley Water Works, and Mr. Todd, who was manager at or before that time of a riveted iron pipe works in Pomona, California. I also consulted what literature was available on the subject; and as a consequence of my investigation made two or three preliminary estimates of cost.

I acknowledge Exhibit U2 and V2 as being (as far as I can remember at this distance from my records) a copy of the last estimate made by me before the departure of said John McMullen for Portland, Oregon, to bid upon said work. No bid made by me at any time was intended to be final for the use of said John McMullen and Lee Hoffman, as it was definitely understood that a similar preliminary estimate was to be independently made by George W. Catt, of New York, which was to contain the experience of Clemens Herschel, chief engineer of the Jersey City pipe line; and also a third estimate was to be independently made by the engineer of Hoffman and Bates, of Portland, Oregon. With this full knowledge I made the rapid and approximate sheets Exhibit U2 and V2, and carried out, for the sake of comparison, an assumed profit of ten per cent, to see what the figures would amount to as a possible bid, in order that certified checks in several amounts might be drawn to accompany said John McMullen to Portland. Exhibit U2 and V2 plainly show the wide latitude which this estimate required, as bid "A" is noted as requiring a check of from \$850.00

to \$1200.00; bids "B" from \$19,500.00 to \$22,000.00; bid "C" from \$9000.00 to \$22,000.00; bid "E" from \$15,500.00 to \$17,000.00; bid "F" and "G" not noted. I was informed before making this Exhibit U2 and V2 that the items of the three estimates, including this, were to be reviewed by our Seattle engineer, Mr. J. B. C. Lockwood, and by the engineer of Hoffman and Bates in Portland, and by the principals, John McMullen and Lee Hoffman, and each individual item checked one with the other, and that which seemed most reliable in the light of such comparison to be used in the final estimate and bid, and I understood, and still understand, that these comparisons were so made, and that such final estimate there resulted. After refreshing my memory by reading a letter written by me March 17th, 1893, to George W. Catt, New York, I find that we figured at that time on manufacturing our pipe by creating a plant which used our "Colusa" excavator engines and other miscellaneous plant in our possession; part of said work to be sublet to or to be under the supervision of Mr. Todd, of Pomona, Cal., mentioned before in this deposition, and using power riveters on longitudinal seams only. I also stated in that letter that the fittings and miscellaneous items in my final estimate taken by Mr. McMullen to Portland were figured high, except that the "gates" were guessed at (it turned out to be too low). After the award of contract and the subletting of the shop manufacture of the pipe to Wolff and Zwicker of Portland, there was little for an office engineer at San Francisco to do in relation to this contract, and in the same letter to which I above referred I stated to George W. Catt, and then and now believe, that said Lee Hoffman refused to buy out the interest of John McMullen, "because he wanted our advice, assistance and Foy" (meaning that our Mr. Foy was to be the active field superintendent and organizer of pipe line forces), and Mr. Foy actually became the active representative of our office in the execution of said contract. And while there may have been some incidental correspondence and consultation between Mr. Foy and myself concerning details of plant and management, I cannot at this date recollect definitely.

[206] Interrogatory 5. I show you a paper of two pages marked Defendant's Ex. U2 and V2, which has been offered in evidence as a copy of a computation made by you in connection

with this work, and ask you if you recognize this as any computation of your own?

Answer 5. I do, as above stated and explained.

Interrogatory 6. If you answer the last interrogatory in the affirmative, I will ask you to state what the purpose of this computation was, that is to say, whether it was designed for a bid on any portion of the work or as an estimate of the cost price of doing the work.

Answer 6. It was in no sense designed as a bid on the work, but, as explained, for the purpose of drawing checks to be used in the bid. It was an estimate of the cost price of doing the work in my opinion, subject to being checked by two other estimates, as explained.

Interrogatory 7. State who, if any one, was engaged in gathering information and compiling the same for the San Francisco Bridge Co., or John McMullen, its general manager, touching the manufacture and laying of steel pipe on this water system from the head works to Mt. Tabor.

Answer 7. To my personal knowledge, gained from access to correspondence on the subject, I would state that Mr. Todd, of Pomona, above mentioned, George W. Catt, of New York, above mentioned, Clemens Herschel, of New York, above mentioned, and myself, were so engaged.

Interrogatory 8. In connection with the matters covered by the preceding interrogatory, I will ask you to state whether or not any bid for this portion of the work was prepared or agreed upon in form to be submitted by the San Francisco Bridge Company or McMullen prior to the visit of the latter to Portland, shortly before the letting took place.

Answer 8. No bid was prepared or agreed upon to be submitted at the letting, or for any other purpose than for preliminary comparison and the drawing of proper certified checks, as above explained.

Interrogatory 9. State what the proposition was in connection with this bidding upon which you were engaged in San Francisco as to a bid, which was to be submitted by the San Francisco Bridge Company or McMullen in connection with Lee Hoffman; that is to say, the manner in which they were to bid upon the work.

Answer 1. It was understood, as result of a visit of Lee Hoffman to San Francisco, before the letting, and as a result of conferences between him and John McMullen, at some of which conferences I was present, that said Hoffman and McMullen were to bid together upon the work for mutual assistance, advice and profit, and at no time was it considered probable that the San Francisco Bridge Company could or would bid alone upon said work with the intention of taking said work; to that end, in order to save time and clerical error, I filled out one or more bidding blanks for said letting in light pencil with figures representing my rough estimate of what it would be proper to bid subject to above explained checks and comparisons, and filled in the signature blanks with the names both of John McMullen and Lee Hoffman, thus indicating clearly my understanding that they were to be associated in the bid intended to take the contract. I also stated in the letter of March 17, 1893, to George W. Catt, above referred to, that "Hoffman won't listen to it" (meaning the selling out of our interest in the contract to Hoffman) "out of regard for McMullen, and also because he wants our advice and assistance and Foy." This correctly represents the attitude taken by Hoffman at that time, and before the letting, and of which I was cognizant, as a participant in interviews between said Hoffman and McMullen.

[209] Interrogatory 10. State fully what, if anything, you did in aid of the execution of the work of manufacturing and laying steel pipe from the head works on Bull Run to Mount Tabor after the contract therefor between the water committee and Hoffman had been entered into, and at whose instance you acted.

Answer 10. As above explained, little was done or required of me after the contract had been let to Hoffman and the subcontract for the shop manufacture of the pipe had been let to Wolff and Zwicker, of Portland, as most of my executive functions would have been connected with the design and establishment of a plant of our own had we built one, as assumed in our preliminary estimates. The transportation having also been sublet, there remained but the field work, which was in charge of our competent specialist, Mr. Hugh Foy, and this distribution of executive responsibility practically relieved me of further responsibility or usefulness in the execution of the

contract. I did some work of investigation with Mr. Todd, of Pemona, however, in the matter of the field riveting and laying of the pipe, but no use was made, that I can remember, of the results of such examination.

And further deponent saith not.

H. S. WOOD,

Subscribed and sworn to before me this 7th day of February, 1896.

[Seal]

THOS. F. DANIELS,

Notary Public, N. Y.

Continued from day to day and finally adjourned to February 24, 1896, at the same place, 11 A. M.

T. F. D.

N. P.

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of Lee Hoffman, Deceased,

Defendant.

Deposition of George W. Catt.

29 Wall Street,

New York, February 24, 1896, 11 A. M.

GEORGE W. CATT, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, deposes and says as follows:

Interrogatory 1. State your name, age, residence and occupation.

To the first interrogatory he saith: My name is George William Catt, I am thirty-five years of age, and I reside in the city of Brooklyn, county of King, and State of New York.

Interrogatory 2. What connection, if any, have you with the San Francisco Bridge Company of San Francisco, California and how long has your relationship with that company existed?

To the second interrogatory he saith: In the early part of the year 1887 I entered the employ of the San Francisco Bridge Company, of San Francisco, California, as chief engineer, and continued to be thus employed until 1889. In 1889 the San Francisco Bridge Company opened a branch office at Seattle, in the State of Washington. At or about this time I was elected vice-president of the San Francisco Bridge Company, and, in addition to the duties of engineer in chief, there was also given into my charge and management all of the business of the San Francisco Bridge Company within the States of Oregon, Washington, Idaho and Montana. This position I held until 1892 (February), at which time the San Francisco Bridge Company decided to open a branch office in New York City, in the State of New York, for the conduct of its business on the Atlantic Coast. On the opening of the New York office, I was transferred to that office, and the management of all the business of the San Francisco Bridge Company on the Atlantic Coast was placed under my direction. I still held the position of vice-president and engineer in chief of the San Francisco Bridge Company. I continued to hold these offices and to act as manager of the Atlantic Coast business of the San Francisco [212] Bridge Co. until December, 1893. In December, 1893, I resigned the position of vice-president and also the office of chief engineer. In December, 1893, the San Francisco Bridge Company sold its business on the Atlantic Coast to another company and I became president, manager and engineer of that company. Since the San Francisco Bridge Company disposed of its business on the Atlantic Coast, my connection with the San Francisco Bridge Co., has been mostly that of consulting engineer upon such matters as they may deem it advisable to secure my advice. I still act in this capacity for them.

Interrogatory 3. State whether or not you have any information in regard to the San Francisco Bridge Company, or John McMullen, its general manager, bidding on certain work let by the water committee of the city of Portland, Oregon, on the first day of March, 1893, for the purpose of bringing Bull Run water to the city of Portland.

To the third interrogatory he saith: Soon after I had undertaken the management of the business of the San Francisco Bridge Company for the States of Oregon, Washington, Idaho

and Montana, Lee Hoffman, of Portland, Oregon, then proprietor and manager of the business conducted under the firm name of Hoffman and Bates, approached me in reference to the San Francisco Bridge Company and that firm joining forces for the building of the contemplated "Bull Run" waterworks for the city of Portland, Oregon. Lee Hoffman and I had several conferences concerning such a union of the two concerns for this work. In 1891, Mr. Lee Hoffman and I journeyed together from Spokane, Washington, to Tacoma, Washington, via the N. P. R. R. During this journey Lee Hoffman and I arrived at a basis of agreement by which the S. F. B. Co. should unite with Hoffman & Bates in the construction of the "Bull Run" waterworks, in case either of us secured from the city of Portland, Oregon, the contract for building said works. The essential point of that agreement was, that the work should be executed by us jointly for the joint account of the two companies, and the two companies should share alike in all losses or profits that might result from such contract for building the "Bull Run" waterworks. It was a general understanding between us, the details of the agreement being left to be settled when a contract was obtained. This arrangement was often referred to by Lee Hoffman, between time of making of it and time of my departure for the management of the San Francisco Bridge Company's business on the Atlantic Coast. It was also agreed between Lee Hoffman and myself that I should make such investigation as I could in reference to the requisite plant, proper tools, etc., for the manufacture of steel water pipe. As a result of this I did make such investigation as I could in reference to the requisite plant, proper tools, etc., for the manufacture of steel water pipe. As a result of this I did make some investigation during the year 1891, by correspondence with manufacturers of tools, etc., also visited the Albion Iron Works of Victoria, B. C., which was at that time manufacturing some pipe of this character. I advised the San Francisco Bridge Company at San Francisco, through Mr. McMullen, of this arrangement with Lee Hoffman, and when the work was advertised for the city of Portland, Oregon, in 1893. In making my estimate for the work mentioned I addressed some of them to J. McMullen and Hoffman & Bates jointly. The agreement was that J. McMullen should collect what informa-

tion he could at San Francisco, California, with the assistance of the engineering force of the San Francisco Bridge Company there concerning the proposed work. He was to take such information with him to Portland, Oregon, where he would meet with Lee Hoffman, who would have secured such information as he could on the same subject modified by his more accurate information of the local conditions, and that what information I could secure by investigation in the east would be forwarded to Lee Hoffman and J. McMullen, of Portland, Or., and that after they had made a comparison of all information collected, they should agree upon the amount to be bid for the work jointly.

Interrogatory 4. State what, if anything, you had to do with preparing any estimates or securing any information or data which were to be used for forming an estimate as to that portion of the work which was let as a separate item under the head of "Manufacturing and Laying Steel Pipe from the Head Works to Mt. Tabor." State generally and fully what you did in this connection.

[215] To the fourth interrogatory he saith: About February 1st, 1893, I received notice in New York City, New York, that the city of Portland, Oregon, had advertised for bids for the construction of the "Bull Run" pipe line, and notice from the San Francisco Bridge Company that I was, first, to investigate in the most thorough manner possible, and report to Hoffman & McMullen, at Portland, Oregon, before March 1st, 1893, concerning the proper and requisite plant and cost of same for the manufacture of such pipe. Second, to investigate as fully as possible the cost of manufacturing such pipe, and laying of the same. Third, to investigate and get the lowest prices possible for the several items of material required in the construction of the pipe line. I had substantially the same request from Hoffman & Bates.

In order to comply with the first request, I, in connection with two assistants, made several trips to shops that had had some experience in the manufacture of riveted pipe, particularly to the shop of McKee & Milson, Patterson, N. J., in whose shop some 30 miles of 48 inch pipe had been manufactured for the east Jersey Water Co. Also visited shops in Pittsburg and other places. I had conferences and correspondence with some

twelve or more manufacturers of such tools as would be required. After advice from San Francisco Bridge Co., and approved by Hoffman & Bates, I employed as an expert Clemens Herschel, chief engineer of the East Jersey Water Company, who had charge of the building of their pipe line, recently constructed. I had a conference with the superintendent of McKee & Milson's shops. As a result of this investigation, I made a report to Hoffman and McMullen, in which I gave the information I had obtained, together with a plan of a suitable shop for the manufacture of the pipes required, for the "Bull Run" line. Also an estimate of the cost of the same.

I pursued the same system in determining the probable cost of manufacturing and laying the pipe, except that it was often with different people from those I had communicated with, in reference to shop and tools. I investigated every possible source of information that was available.

Third, I communicated by correspondence with every manufacturer of each different item of material required in the construction of the "Bull Run" pipe line that I knew of, and I had a personal conference with every one of such persons it was possible for me to see. On all of these matters I made reports from time to time to Hoffman and McMullen, at Portland, Oregon. To reach a correct estimate and to avoid the possibility of error, I carefully arranged by number the several items included in the proposal found at the end of the specifications issued by the city of Portland for the "Bull Run" water supply. Beginning with (1) for the item of "clearing and grubbing" in line 7 of page 72 of specifications, and numbering continuously to item 26 on line 11 of page 73, "solid rock." Beginning again with 27 for item "steel," line 5, on page 74, continuing consecutively and regularly until the last item on page 75 "earth" was given. No. 68, except that there was given 6½ to item "wrought iron," on page 72, and a new item added numbered 33½, "bricks laid in cement," to correspond in the "steel bid" for item 13 in "iron bid," and further, inasmuch as the specifications had designated each class of items that were to be bid on together, as "Bid A," "Bid B," etc., to "Bid G," and had omitted to make any designation for the class items under the head of "steel" I added the class "bids for steel," designating them as "Bid DD" and "Bid DDD." In making my reports I

designated them as reports on "Bid A," "Bid C," "Bid DD" or "Bid G," as the case might be. This was to avoid confusion, and was following the system used in the specifications.

These several reports, beginning about Feb. 10th, 1893, and continuing until Feb. 28th, 1893, and finishing with a telegraphic report which materially modified much that had been forwarded earlier, were sent as my estimates of the cost of doing the work. They comprised in all some 25 or 30 separate reports. In making these investigations I wrote at least one hundred and fifty letters, and interviewed altogether not less than one hundred persons. I wrote numerous letters also to Mr. McMullen and Hoffman & Bates, prior to the bidding on March 1, 1893. From about Feb. 5th, 1893, until about March 15th, 1893, the entire office force of the San Francisco Bridge Co., in New York, was employed exclusively on the work of investigating and forwarding the information secured to Mr. McMullen and to Hoffman & Bates concerning the "Bull Run" pipe line. The actual expense account of the office force of the San Francisco Bridge Company, at New York, at this time was \$1,050.00 per month. There were many additional expenses occasioned by the investigations and reports mentioned.

Interrogatory 5. I show you herewith a copy of a paper which has been introduced in evidence by the defendant, marked "Defendants Ex. Y2 G. A. B. Ex.," the original of [218] which purports to be a compilation of figures made by you touching the work last referred to, and will ask if you recognize this as a compilation prepared by yourself.

To the fifth interrogatory he saith: I have refreshed my memory by reading my letter-press copies of all the reports I made on the "Bull Run" pipe line. "Ex. Y2, G. A. B. Ex." is part of a schedule of estimates of cost accompanying one of my reports, but is not all of the schedule, and some of the items are not the same as in my report. The original (of which this is a copy) is headed "Portland Water Works Estimate."

Interrogatory 6. If you shall answer the foregoing interrogatory in the affirmative, I will ask you to state what said compilation was designed to cover, that is, to say, whether it was your purpose that it should be used as prepared as the basis of a bid on said work, or whether it related to your estimate as to the cost for which the work should be done only.

To the sixth interrogatory he saith: I have not answered interrogatory 5 in the affirmative, but I will state that my original compilation (of which the said exhibit Y2 purports to be a copy, but was not) was designed to cover my estimate of the cost of the items mentioned in said compilation, but was subject to correction on further information, which I was endeavoring to obtain; and it was so corrected and it was intended to be used by Hoffman and McMullen in enabling them to judge as to what would be a proper and safe bid to make for that portion of the "Bull Run" pipe line.

19] Interrogatory 7. Please state what you did, or were required to do by the San Francisco Bridge Company or by Mr. McMullen, in connection with this work referred to, and what any reports rendered by you to the San Francisco Bridge Company or to McMullen were designed to cover, and what office they were designed to perform.

To the seventh interrogatory he saith: The estimate headed "Portland Water Works Estimate" was designed to cover the items named therein, and was my report of the estimated cost of the work, based on the information I then had, and was subject to correction in future reports; and it was thus corrected. The report, of which this is a partial and somewhat incorrect extract, was made Feb. 21st, 1893, and was the first general report made. There were some ten or twelve reports made after it. They were all of them intended to aid McMullen and Hoffman in making up a bid for the "Bull Run" pipe line works, and embodied my estimate of the cost. It was not intended as a bid, the letter which accompanied it called it an estimate. The several parts of it were called "bids" because that was the designation given them in the specifications. They were, however, in no sense bids or tenders for the work, nor were they intended as such. Throughout my reports such expressions as these frequently occurred:

220] "My estimate item No. is only approximate, you best check this carefully"; or, "This is my estimate, you may think differently."

The actual amount of this bid to be put in was to be determined at Portland, Oregon, by the representatives of the two concerns. My estimates were to aid these representatives in arriving at a proper and safe bid to make for the work.

Interrogatory 8. I show you another paper consisting of three pages, which is a copy of another document which purports to be a copy made by one H. D. Bush of certain computations made by you in connection with this same work. This paper is marked "W2, W2 page 2. and W2 page 3." State whether or not this is a copy of any computation you may have made in connection with this work, and if so, what the purpose of the computation was and what office it was designed to fill.

To the eighth interrogatory he saith: The sheet marked "W2" is a part of a letter containing one of my reports on the probable cost of a plant suitable to manufacture the riveted pipe required for the "Bull Run" pipe line, and is a correct compilation from the report. It was intended to give McMullen and Hoffman my idea of the plant required and the cost of the same; it was not final, nor was it to be followed literally. Sheet "W2, page 2," is not a copy of any information by report or otherwise of anything I sent to McMullen and Hoffman at Portland, Oregon, or elsewhere. Some of the items not to be found in some of my reports. Some of the items are not to be found in any of my reports. Sheet three or "W2, page 3," is not a copy of any work that I did in connection with the "Bull Run" pipe line, or any other work.

[221] Interrogatory 9. State fully what, if anything, you did in aid of the execution of the work of manufacturing and laying steel pipe from the head works on "Bull Run" to Mt. Tabor after the contract therefor between the water committee and Hoffman & Bates had been entered into, and at whose instance you acted.

To the ninth interrogatory he saith: As soon as I was advised by telegraph that the contract for building the "Bull Run" pipe line had been awarded to Hoffman & Bates, I secured further interviews with Mr. Clemens Herschel with reference to the difficulties that were encountered in the work of building the East Jersey Water Co.'s line. The information I obtained concerning the shop and field work, rivets in field, hand holes, fittings, loose joints, etc., I communicated to Hoffman and Bates, and also to Mr. McMullen, and I continued to advise with both, Mr. McMullen and Hoffman & Bates with reference to the execution of the work until about September

1st, 1893. Among other things I, at the request of Hoffman & Bates made some investigation about tools for field work, and as a result secured and sent forward some tools for the work. I also, at the request of Hoffman & Bates, made investigation about men for the work, by interviews in New York, and by correspondence with parties in Philadelphia and Pittsburg, Penn., of all of which I advised Hoffman & Bates, as well by telegrams as by letters.

And further deponent saith not.

GEO. W. CATT.

222] Subscribed and sworn to before me this 24th day of February, 1896.

[Seal]

THOS. F. DANIELS,
Notary Public, N. Y.

In the Circuit Court of the United States for the District of Oregon.

JOHN McMULLEN,

Complainant,

vs.

JULIA E. HOFFMAN, Executrix of the Will
of Lee Hoffman, Deceased,

Defendant.

State of New York,
County of New York.

} ss.

Certificate to Depositions.

I, Thomas F. Daniels, Notary Public, in and for the county and state of New York, duly commissioned, sworn and qualified, hereby certify.

That pursuant to the stipulation hereto annexed, the foregoing depositions on the part of the complainant were taken before me at the city of New York, at my office, No. 29 Wall
223] Street, at the time designated on said depositions, as will more fully appear thereby.

That upon the taking of said depositions neither of the parties was represented before me.

That the said witnesses, before making their depositions, were each by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that their respective depositions were then typewritten in the presence of said witnesses, and said depositions were then read over to said witnesses respectively, and subscribed by them in my presence; that the names of said witnesses are Henry S. Wood and George W. Catt.

I do further certify that I am not of counsel or attorney to any of the parties hereto, and am not interested in the event of the cause.

That I have retained the said deposition in my possession until delivered by me at the postoffice of the city of New York to a proper clerk in charge for mailing.

That said depositions, together with this my certificate, were enclosed in an envelope or wrapper in letter form, which was securely sealed and directed to J. A. Sladen, Esq., clerk of the Circuit Court of the United States for the District of Oregon, Portland, Oregon, and in this form and condition I deposited and delivered the same at said postoffice of the city of New York, prepaying the postage thereon.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at said city of New York, this twenty-fourth day of February, one thousand eight hundred and ninety-six.

(Seal)

THOS. F. DANIELS,

Notary Public, N. Y.

(Endorsed): Filed March 2, 1896. J. A. Sladen, Clerk.

[24] *In the Circuit Court of the United States for the District of Oregon.*

JOHN McMULLEN,	}
Complainant,	
vs.	
LEE HOFFMAN,	
Defendant.	}

Testimony.

United States of America,	}	ss.
District of Oregon.		

This certifies that on this 7th day of January, 1896, at the hour of 2 P. M., the parties herein appeared before the undersigned, Geo. A. Brodie, examiner of the above-entitled Court, the complainant appearing by Mr. L. B. Cox, of counsel, and the defendant appearing by Mr. Rufus Mallory, of counsel, and thereupon the taking of testimony on the part of the complainant was begun as follows:

Counsel for complainant offered in evidence the contract, or what purports to be a contract, of copartnership between Lee Hoffman and John McMullen, formal proof of which is waived by the defendant. The same is received in evidence, filed and [225] marked "Complainant's Exhibit No. 1, G. A. B. Ex."

FRANK T. DODGE is thereupon called as a witness for the complainant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX.

Q. What is your occupation?

A. Clerk of the water committee of the city of Portland.

Q. How long have you held that position?

A. Six years, I think; I won't be sure.

Q. You have been subpoenaed to appear and bring certain records appertaining to the controversy in which your testimony is now being taken. I will ask you to state if you have in your possession as clerk of the water committee a certain contract which was entered into between Lee Hoffman and the city of Portland, acting through its water committee. A. I have.

Q. Said agreement bearing date the 10th day of March, 1893?

A. Yes. (Witness produces the paper referred to).

[226] (Council for complainant offers in evidence the document presented by the witness, dated the 10th day of March, 1893, signed to Hoffman & Bates, by Lee Hoffman and Henry Fail- ing, chairman of the water committee, together with the specifications, etc., attached thereto, and the endorsement in writing at the end of the specifications bearing date March 10th, 1893, and signed Isaac W. Smith, engineer of the water committee, it is agreed between counsel for complainant and defendant that a copy of this contract may be prepared and when certified by the examiner may be received in evidence in lieu of the original and marked "Complainant's Exhibit No. 2.")

Q. I will ask you whether or not any amendment or alteration, whether by addition or subtraction or otherwise, was made by the water committee or its chief engineer, or any one else acting in its behalf, to the terms or specifications in the contract (which has just been offered in evidence, and if so, whether or not there is any written memorandum of the same in your office?

A. I am not able to answer that question positively. I have not thought of the matter at all, and did not have time to prepare myself since I got this subpoena. In speaking with the engineer, I showed him the subpoena, and made mention of the fact of the alterations. He said at first there had been none. I said, "Was not there some change made in taking off some plate at Sandy River Crossing?"

Q. You need not go into details about that.

A. Then I cannot answer the question.

Q. Is there any one connected with the water committee who would have better knowledge of such matters than yourself.

A. I think the chief engineer would.

Q. Who is the engineer? A. Isaac W. Smith.

Q. Now, I will ask you to state if you know what was done under the contract which has just been offered in evidence as Exhibit No. 2. towards the performance of the work therein provided to be done.

[227] A. The terms of the contract were generally complied with, if I understand your question correctly.

Q. I wish you would make a general statement now, and by that I mean a comprehensive statement, which will also be particular as to the amount of the work that was done under this contract and the general condition of affairs as between the water committee and the other contracting party at this time.

A. Allow me to state I did not understand your question, Mr. Cox, or I should not have answered as I did. In this subpoena it wished me to state the amount that was paid according to the contract, and then the amount that was paid for extra work. When you spoke of work that was done under the contract I had in view this final estimate which I brought down showing the total amount which was paid under the contract less the retained percentage of ten per cent that has never been paid. It is held until the pipe line is finally accepted by the water committee. There has been no formal acceptance of it. I stated generally that the work was done, simply because the large bulk of the work according to the final estimate has been paid for. I wish to explain that I do not feel competent to say whether the work has been done or not. I am custodian of the papers, but the engineer is the man to say whether the work has been done or not.

Mr. COX.—You are some little in advance of my question.

(It is stipulated between counsel herein that all the work provided for in the contract Exhibit No. 2 has been performed in accordance with the terms of the contract, and that consequently it is unnecessary for the complainant to introduce evidence on that point.)

Q. I wish you to state if you have any records in your office showing what, if any, extra work was done for the purpose of bringing Bull Run water to Portland, that is, any work having that object in view in addition to the work covered by the contract, Exhibit No. 2.

A. That would take quite a while to prepare an exact answer to. Perhaps I ought to explain why. In the beginning the water committee decided that I should open an account with each different head under which the work was subdivided by the engineer and keep the account in that way, and not with the numerous contractors. There was nothing to the credit of any contractor until the engineer at the end of the

month made his estimate; then there was a cash payment, and that amount was charged under the proper head. I have got my books of account with Hoffman and Bates for this work, or the principal portion of it, made up in an account known as "Manufacturing & Laying of Steel Conduit."

Q. Could you determine from an inspection of the books kept by you as clerk of the water committee the extra work which was done by Hoffman in addition to that covered by the contract, "Complainant's Exhibit No. 2," for the purpose of bringing Bull Run water to Portland, and its value?

A. Yes, sir.

Q. I will ask you to make that investigation and prepare yourself to give such testimony at a later stage. About how long will it take you?

[229] A. Just at present I am extremely busy with the closing up of the year's work. I can give it to you in three days, or sooner, if you require it.

Q. I understand that you are not in position at this time to give any evidence as to the value of the extra work as well as to its character?

A. No. As to its character, I could not tell you that.

Q. Now, I will ask you if there are any records in your office which will establish the amount of money which has been paid on the contract, "Complainant's Exhibit No. 2," to Lee Hoffman or for his account?

A. Yes. There is the final estimate showing the total amount of work was \$509,825.22, of which amount 10 per cent is retained, which is \$50,982.52. There has been paid on the engineer's estimate \$458,842.70.

Q. Then I understand 90 per cent of the principal sum has been paid over by the water committee to Lee Hoffman?

A. Yes, sir.

Q. At what time was the last payment made?

A. The 20th of December, 1894. This is the receipt of Hoffman & Bates for the last payment. (Witness produces receipt.)

(Counsel for complainant offers in evidence the paper produced by the witness and described by him as the final estimate of the work upon the construction of which this payment, or the payment of 90 per cent of the contract price, was consummated and the balance paid over. It is stipulated between

counsel that a copy thereof may be made and substituted in lieu of the original, and marked "Complainant's Exhibit No. 3.")

0] Q. In connection with the final estimate proper which you have produced there appears to be a number of specifications of particulars. I wish you would explain what they are.

A. Well, this is the amount under each different size of pipe, 35-inch pipe and No. 6 plate.

Q. Without going into details is that a specification of the items that go to make up the aggregate found on the estimate?

A. Yes, this is simply a recapitulation. You see it there. (Pointing to document.) Those figures there are identical with these.

Q. These are taken from the preceding two pages?

A. Yes.

(Counsel for complainant offers in evidence the papers referred to by the witness. It is stipulated between counsel that a copy thereof may be substituted in lieu of the original, and marked "Exhibit 3A.")

Q. I notice that these estimates and the vouchers filed therewith, as well as the original contract, are in the name of Hoffman & Bates. You understand, do you, that Mr. Lee Hoffman was doing business under that name? A. Yes, sir.

(Witness excused for the present.)

JOHN McMULLEN, the complainant, is called as a witness in his own behalf, and being first duly sworn testified as follows:

231]

Direct Examination.

Questions by Mr. L. B. COX:

Q. State your place of residence.

A. San Francisco, California.

Q. You are the plaintiff in this suit? A. I am.

Q. Exhibit No. 1 offered in evidence purports to be a contract of copartnership between Lee Hoffman and yourself touching certain matters therein specified and it has been admitted by counsel for both sides that the work therein referred to has been executed; I wish you would proceed and state what, if anything, you had to do with the execution of the work by way of contribution of money or services or otherwise.

Counsel for defendant objects to the question so far as it refers to anything that may have been done after the 14th day of September, 1893, for the reason that what may have been done after that is immaterial and incompetent.

A. Well, I carried out everything that that contract implies; we frequently conferred together as to the best way to administer the work, to inaugurate, to start it, and to conduct it, and we conferred together relative to the best men that either one of us might have available.

Q. When you say "we," explain who you mean.

A. I mean Lee Hoffman and John McMullen, and we jointly conferred together and determined matters and things in connection with this business that was to be inaugurated and to be prosecuted, and we did that personally, and we did it by letters and telegrams.

[232] Q. Where were you at the time Exhibit No. 1 was signed?

A. I was in Portland, Oregon.

Q. How long were you here after the execution of that exhibit.

A. I could not say exactly, several days, I think.

Q. Now, do I understand that it was during that time you and Mr. Hoffman were conferring upon the subject of the execution of the work? A. Yes, sir.

Q. State what, if anything, you contributed in the way of money or property towards the execution of that contract between you.

A. Well, we canvassed the subject of a plant, and what was available, and what he had and what we had—I mean now the San Francisco Bridge Company; we had a plant at Seattle; it was determined that so much of the plant that was suitable would be shipped over to start this work with; this plant was so shipped and was put on the work, and was used during the construction of the work; I think the value of that plant was about fifteen hundred dollars; there was also some other plant that was purchased by us in San Francisco and shipped up here, one item of which I call to mind now was a portable forge for heating rivets in the field. There was also some plant that was purchased in New York, at least it was purchased by the San Francisco Bridge Company representa-

tive in New York; I think it was purchased in Pittsburg; some shears for shearing iron, and some hydraulic riveters.

Q. Do you remember what it cost?

A. No; I said riveters—I think it was an hydraulic punch,
33] and I think the cost was in the neighborhood of twenty-five or twenty-seven hundred dollars.

Q. Do you mean for the punch?

A. No, I mean for the whole; the punch, I think, was three or four hundred dollars for the punch and shears.

Q. Then the whole amount that you contributed all told to the prosecution of the enterprise was how much?

A. In money or plant I think about twenty-six or twenty-seven hundred dollars; somewhere between twenty-five hundred and three thousand dollars.

Q. You mentioned the San Francisco Bridge Company; state what your relations to that institution are or were.

A. I was president and general manager, and principal stockholder.

Q. What connection had you with furnishings which were provided by that company to this work?

A. They were furnished and provided at my request by this company—by the San Francisco Bridge Company.

Q. In exhibit No. 2 it is one of the requirements that the contracting party, Mr. Hoffman, should give a bond with sureties to the water committee for the execution of that contract. I will ask you to state what, if anything, you may have had to do with that.

A. Well, after the award was made, we canvassed the subject, and Mr. Hoffman stated that there were plenty of people—merchants or firms in Portland—who would be glad to go on his bond for this contract, because they wanted his trade
234] that would be required—wanted to sell him the goods that would be required in the execution of the contract, and I went with him to the hardware men when he asked them to go on his bond—I think it was De Hart & Co. I particularly cautioned him; in fact, I remonstrated with him about it.

Q. You need not go into details; I simply asked what you did in regard to this matter of a bond.

(Counsel for defendant objects to the question as incompetent and immaterial.)

A. Well, the bond was given, but the only active thing I did was to try to influence Mr. Hoffman as far as possible not to get people on his bond who expected his trade.

(Answer objected to by defendant's counsel.)

Q. I will ask you to state whether or not Mr. Hoffman made any demand or request upon you to provide or assist in providing any sureties on that bond.

A. He never did; on the contrary, he told me there was any number of people in Portland would be glad to go on his bond.

Q. I will ask you to state what the arrangement was between Mr. Hoffman and yourself in regard to the active supervision and prosecution of the work contemplated by your contract, Exhibit No. 1?

[235] A. Well, it was agreed and understood between us that the business to be done in Portland or in Oregon would be attended to by Mr. Hoffman, because he resided here, and knew the water committee, and the engineer, and was familiar with everything here, and it was also agreed that inasmuch as we had an office in New York, we had an office in San Francisco, and an office in Seattle; it was agreed that any outside business that was to be transacted in the interests of the partnership at these places would be attended to by the San Francisco Bridge Company at my direction.

Q. I will ask you to state what, if anything, was done by way of complying with any requests that were made by the San Francisco Bridge Company at your request towards the prosecution of this work.

A. Well, we did a great many things in San Francisco in the way of purchases, and in the way of investigating the most economical method of construction or doing the work; there was no one in Portland that had had any experience; Mr. Hoffman never had had any experience in pipe work, while in San Francisco there was a great many people, or perhaps not a great many, but several, in particular the Risdon Iron & Locomotive Works, who had been engaged in business, and at Mr. Hoffman's request, repeatedly by telegram, sometimes by letter, I conferred with these people.

MR. MALLORY—The letters are the best evidence on that subject.

MR. COX—It is as to the proof of the contents of the letter, but I want to show the fact that he did perform certain services.

Q. How long did this action on your part, or the part of the San Francisco Bridge Company at your instance, continue?

[36] A. It continued throughout the whole job; Mr. Hoffman, after a certain period in the progress of the work, refused to or at least, he desisted from making any demand on us for anything in connection with the job, but I was repeatedly in Portland afterwards, and repeatedly on the work, and the man whom we had up here as general superintendent, Mr. Hugh Foy, was the man that was employed by the San Francisco Bridge Company for a number of years, and was a stockholder, and had a direct interest in the San Francisco Bridge Company; consequently, remained as superintendent on the work during all the work that was done during 1893. There was perhaps a dozen or fifteen men, sub-superintendents or skilled men, that had been furnished or put on the work by the San Francisco Bridge Company, men who were accustomed to do that kind of work for which they were selected.

Q. State what your willingness was to comply with any request that might have been made upon you during the time of the prosecution of this work, and assisting in its execution.

A. We were always willing to do anything that we had agreed to do.

Q. You may state whether or not any sums of money have been paid you on account of the moneys earned in the execution of this work by the city of Portland.

A. We were never paid anything; we were never reimbursed for any of our original capital invested in it.

Q. What knowledge have you—personal knowledge—in regard to the aggregate amount of work which was performed both under the original contract with the city of Portland, and any additions thereto, which had for its object bringing the Bull Run water to the city of Portland?

[237] A. I had a general knowledge of the value of the work done, and I knew it was substantially as has been shown by the estimate of the engineer.

Q. Well, have you any particular knowledge in regard to this matter?

A. No, I have no detailed knowledge.

Q. You may state what knowledge you may have, or may have had, prior to the institution of the suit in regard to the moneys that may have been paid by the city of Portland or the water committee on account of the particular work or any extra work mentioned in the contract referred to.

(Objected to by defendant's counsel as immaterial.)

A. Yes, I had a general knowledge that the work was paid for substantially as was required, but I had no specific or detailed knowledge of the amounts paid at the different times, or of the disbursements made at different times by Mr. Hoffman.

Q. I will ask you to state whether, at any time, you made demands upon Mr. Hoffman for information in regard to these particulars.

A. Yes, I made demands upon him.

Q. What time was it?

A. About the 4th of December, 1894.

Q. What was the result?

A. He refused to accede to my request, and declined to permit me or my representative to inspect the books and accounts of the job.

Q. What reason did he assign for, if any?

A. I don't think he assigned any reason.

[238] Q. You may state whether or not anything was said or discussed between you as to the fact of your interest in the work or its proceeds as an owner.

A. He never denied my interest in the work.

Q. My question is whether or not there was any discussion between you on that point.

A. Yes, there was; I don't know that there was any discussion on that point—when I asked him to show me the books and when I desired to get a general idea of the books—of the condition of the job; he always met me with the proposition to know what I would take for my interest in it, and I always declined to make any offer, to accept any sum, unless the books were disclosed, and that was about the sum total of what transpired at the meeting on the 4th of December, 1894.

Q. Upon what ground, if you assigned any, did you make your demand for an inspection of the books?

A. On the ground that I was a partner on the job, and had as much right to see the books as he had.

Q. And what was his response?

A. Well, his response was—he got ill-tempered, and his response was that I could not see the books.

Q. Now, you may state whether or not you ever made a request upon him for a statement or information as to the amount of money which had been earned in the execution of this contract apart from an inspection of the books.

A. Well, I made a demand on him for a statement of disbursements on account of the job, and the moneys earned; I had a public knowledge, that is, they were public in the papers that could be seen at the water committee's office, of the amount of the estimates every month.

239] Q. What was his response to that?

A. Well, he declined absolutely to give any data whatever relative to the job, and always coupled it with the proposition that I should name a price for which I would sell out.

Q. You have said that you contributed certain properties towards the execution of this work; state if you know whether or not Hoffman contributed anything in the way of property thereto.

A. Well, I think he contributed a certain amount of plant that he had on hand, that was the understanding when we started the job; I did not see that plant, yet I am satisfied that it went on to the work.

Q. Have you any personal knowledge at the present time as to the existence or condition or value of the property contributed by yourself or the San Francisco Bridge Company at your request, and by Mr. Hoffman, towards the execution of this work?

A. I have not.

Cross-Examination.

Questions by Mr. R. MALLORY.

Q. You are aware that Mr. Hoffman is dead?

A. Yes, sir.

Q. You say in the matter of performing your part of the contract, Exhibit No. 1, you did all that that contract implies. Now, did you do all that it expresses?

A. I thin kso.

Q. You think that you did everything that it required you to do?

A. I think so.

[240] Q. You conferred together a very good deal in relation to this contract?

A. We did.

Q. Did you have any conferences together about this business prior to the time that the contract was awarded to Hoffman & Bates?

(Counsel for complainant objects to the question as incompetent and immaterial, and not proper cross-examination.)

A. Well, our conferences prior to the awarding of the contract were mainly relative to the cost of the work; I am now construing the awarding of the contract to be identical with the putting in of the bids which it was substantially within a day or two; prior to that time, we could not have conferred about this business, because we did not have any contract to confer about, but we had been estimating and figuring and calculating on the cost of doing the work as it was presented by the specifications.

Q. Whatever consultations you had with Mr. Hoffman relative to procuring the contract from the water committee was with a view of making you and he performing the work together in case you got the contract, was it not?

A. Yes, sir.

Q. You prepared the bids which were submitted to the water committee, did you not?

(Objected to by the complainant.)

A. Well, if by using the plural you mean bids for the different sections of the work as it was advertised by the committee, yes; if you mean only the part that was secured, manufacturing and laying the pipe, I should say no.

[241] Q. Whatever work you afterwards did in the way of manufacturing and laying the pipe was a result of your arrangement with Mr. Hoffman for procuring the contract in the first instance, was it not?

(Same objection.)

A. I think so.

Q. You and he made figures together for the purpose of bidding on this contract that was afterwards awarded to Hoffman & Bates, did not you?

(Same objection.)

A. We did.

Q. And the contract was awarded upon the bid prepared by yourself and Mr. Hoffman?

(Same objection.)

A. I think so; that is correct.

Q. Do you not know so?

(Same objection.)

A. Yes, I think I know so; if you will read the question again I will make it a little more explicit.

(Last two questions read to the witness by the Examiner.)

The WITNESS.—Yes, I know it is so.

Q. The bid that you prepared in company with Mr. Hoffman was with a view to the execution of the contract, Exhibit No. 1, in case the contract should be awarded upon your bid?

(Same objection.)

A. Exhibit No. 1 was not in existence at the time the bid was made.

Q. I will put my question in another form, When you and Mr. Hoffman were preparing your bid which was afterwards submitted for the work that was awarded to Hoffman & Bates, [242] did you not then expect to have the contract, Exhibit No. 1, executed for the purpose of carrying it into effect?

(For the sake of convenience, it is agreed between counsel that counsel for complainant may take a general objection to all questions submitted to the witness touching transactions which were had prior to the execution of the contract, Exhibit No. 1, relative to the work therein contemplated, which objection, unless otherwise specified, shall be based on the ground that the same is immaterial and not proper cross-examination.)

A. Carrying what into effect?

Q. For the purpose of performing the work described in your bid.

A. I don't quite understand that question.

Q. Then I will ask you another one; when you and Mr. Hoffman prepared the bid for manufacturing and laying the pipe mentioned in that bid, did you not then understand, and was it not agreed between you, that if you secured the contract for the work described in your bid, you would execute the contract, Exhibit No. 1?

A. No, sir.

Q. When did it first occur to you to make contract, Exhibit No. 1?

A. After the water committee had awarded the contract to Hoffman & Bates on their bid; I think that award took place on the 4th or 5th of March; Exhibit No. 1 was made on the following day, or the 6th of March.

Q. Then while you and Mr. Hoffman were working together and preparing the bid, you had no expectation that if awarded [243] to Hoffman & Bates you would be a partner to the execution of the work?

A. Certainly I had expectations decidedly. All the correspondence for three months prior to that will show that it was mutually agreed that we should be partners.

Q. What, then, did you mean by your last answer, in which you said you did not expect contract, Exhibit No. 1, would be executed at the time you put in the bid for the work?

A. Well, your question seems to assume that Exhibit No. 1 was in existence before the bid for the work was put in.

Q. You misapprehended my question altogether; I made no such statement as that. Then I understand that while you and Mr. Hoffman were figuring together and preparing the bid for manufacturing and laying that pipe you expected to be partners in executing the work if you got it, if it was awarded on that bid?

A. Yes, that is correct, not only expected to be, but we had agreed to be.

Q. Then the contract, Exhibit No. 1, was simply reducing into the form of a writing the agreement that had already been made between you long previous?

A. That is not quite correct; the agreement was that we should bid together—that we should make a bid on this job together; now, there was an “if” there, in other words, the conditions that prevailed after the contract was awarded was different from the conditions that prevailed when we were simply in the air trying to see what the job would cost, and conferring with each other; but we had a tangible, absolute thing when [244] the award was made from the water committee of the city of Portland for a half million dollars’ contract, and that award was of record, and Exhibit No. 1 was a declaration that we were partners in the existing contract between Mr. Hoffman and the Portland water committee.

Q. Was the contract, Exhibit No. 1, reduced to writing at the time it was agreed upon between yourself and Mr. Hoffman?

A. It was reduced to writing on the day of the signing, on the 6th day of March, 1894.

Q. Had it been agreed upon at any time prior to that?

A. Well, I suppose by "it" you mean exact language—exact kind of instrument—I think not.

Q. Mr. McMullen, I do not mean that, and I think you fully understand that I did not; I want to know whether the substance, the general substance and purport of that agreement, had been understood between you and Mr. Hoffman prior to the time that that contract was awarded to Hoffman & Bates by the city water committee?

A. Well, I think I have certainly tried to make the matter clear.

Q. Let the examiner read the last question.

(Question read to the witness.)

A. The general substance and purport—is that the language of the question?

Q. Yes.

A. Had been agreed upon—the purposes had been agreed upon? Well, it was agreed before the award had been made that we were to be partners; now, after the award was made, this paper, Exhibit No. 1, is the identical agreement that we [245] mutually assented to—it was reduced to writing in Mr. Hoffman's attorney's office, and we both signed it.

Q. The general purport of that contract had not that been entered into between you long before that?

A. You understand as a lawyer that we could not make the contract—

Q. Just answer the question I have asked you.

A. No, you could not say that because this contract, Exhibit No. 1, says that so and so existed, and so and so did not exist before that award; we had agreed to be partners, if that is all the agreement meant after reducing it to writing, if the same thing was synonymous in your mind; I think the two things are entirely different.

Q. Let me put it in this form: When you and Mr. Hoffman were figuring upon a bid for manufacturing and laying the

pipe for the Bull Run waterworks, did you not have an agreement together to be partners in the performance of the contract if it was awarded to you?

A. We had a verbal agreement.

Q. That is what I am asking.

A. A tacit understanding, as our correspondence will show; I think the correspondence will show better than anything else.

Q. Well, I am asking the question—then it was with that idea in view that you and he bid together for that work, was it not?

A. We bid for it with the idea of getting the contract and doing it if we got it.

Q. You and he together? A. That is right.

Q. As partners? A. That is right.

[246] Q. After the work had been awarded, then you and he had your contract of partnership put in writing stating such were the facts as the new condition of things had brought into existence?

A. Well, that is correct; we couldn't have it before, judge.

Q. Well, Mr. McMullen, I am coming to the point; now, then, as I understand you, your statement is about this: You and Mr. Hoffman had an understanding together that you would bid for the work that has been named in your deposition, that in pursuance of that agreement you did prepare a bid for that work, and submit it to the water committee, and the contract was awarded by that committee to Hoffman & Bates, in whose name the bid was put in; that you and Mr. Hoffman afterwards made the contract, Exhibit No. 1, in this case, for the purpose of performing that work, is that it?

A. That is correct.

Q. Was any other bid submitted for that work by you except the bid agreed upon by yourself and Mr. Hoffman?

A. By that work, do you mean this particular section of the work?

Q. Yes.

A. And by me do you mean the San Francisco Bridge Company?

Q. Yes, yourself, or the San Francisco Bridge Company.

A. Yes, there was another bid put in.

Q. Did Mr. Hoffman know what that bid was before it was put in?

[247] A. Yes, Mr. Hoffman knew that it would be higher than the bid that we proposed to take the job on.

Q. Both you, then, and Mr. Hoffman knew that that bid was not in face to be a competing bid?

A. That is correct, sir.

Q. You submitted that bid to the water committee?

A. I think that is correct.

Q. The rules of bidding there required that you should deposit a certified check for I believe, 5 per cent—you will remember whether I am right—of the amount of your bid?

A. I think that is correct.

Q. Did you submit with that bid that certified check?

A. We did.

Q. Was this bid submitted in your name or in the name of the San Francisco Bridge Company.

A. Submitted in the name of the San Francisco Bridge Company.

Q. By yourself—you handed it to the committee?

A. No, I think—well, I won't be sure about that; the San Francisco Bridge Company had its Seattle representative here at the time, but it was done by my direction, if not by me personally.

Q. Mr. McMullen, you had not any expectation that that contract would be awarded to you on that bid when you knew that bid of Hoffman & Bates would be considered at the same time, had you?

A. I had not.

Q. Mr. McMullen, how long did you come to Portland before the bids were to be opened by the water committee for this work?

[248] A. I think about five to six days before; if you want it to be accurate, I will have to look it up.

Q. Did you prepare any bid for this work, or substantially the same work, to be submitted to that commission?

A. No, I did not.

Q. Did you do any preliminary figuring with reference to the bid upon that same work before you consulted with Mr. Hoffman? A. Oh, yes.

Q. Did you not, as a matter of fact, Mr. McMullen, come prepared, or prepared while you were here, a set of figures to be bid for substantially the same work, which was a number of dollars less than the amount of the bid agreed upon between yourself and Mr. Hoffman to be bid?

A. I never did.

Q. Did you ever have any such a bid as that that you exhibited to Mr. Hoffman?

A. Well, now, judge, I think you are falling into an error in confounding a bid with an estimate.

Mr. COX.—Don't be argumentative; simply answer the questions.

The WITNESS.—Repeat the question.

(The question is read to the witness.)

A. In the first part of the question it is a set of figures, in the second question it is a bid. Now, I cannot answer the question intelligently under the circumstances. There is a great deal of difference between a set of figures and a bid. If you mean a bid, then I will answer you; if you mean a set of figures, it is something different.

Q. I will ask you for a set of figures intended for a bid.

A. No, sir; never did; never had any set of figures that [249] were in any way intended for a bid except the set of figures that was put in by Mr. Hoffman, under the name of Hoffman & Bates, in which I had an interest.

Q. The set of figures or bid which I have referred to were they not exhibited to Mr. Hoffman, and did you not indicate or say to Mr. Hoffman that you intended to file them with the committee as a bid, and did he not object unless the amount was raised above the statement as he had prepared it?

A. I never did, and he never did; we conferred together about the amount that we should bid, and when we arrived at a conclusion the bid was put in, and that was the only time that our joint judgment agreed as to what the value of this work was.

Q. Do you swear, Mr. McMullen, that you did not come here with a set of figures intending to bid upon this work or if not did you not prepare a set of figures while here, intending to bid upon this work—which you exhibited to Mr. Hoffman, and that Mr. Hoffman objected to your making a bid without increasing the amount charged for this work?

A. I did not.

Q. You swear that you did not?

A. I swear that I did not.

Q. Now, then, I will ask you this question—

The WITNESS.—Now, let us be fair about this; you seem to take a great deal of interest in it.

[50] Mr. MALLORY.—Let me finish my question.

The WITNESS.—Now, I am free to admit, and I want it to go on record that it was my effort in toning down the joint bid that secured this work; if Mr. Hoffman had been left alone—

Mr. MALLORY.—That is not responsive to my question, Mr. McMullen, I will give you a chance to answer it.

Q. Did not Mr. Hoffman prepare some bids, or a bid that he intended to submit for this work—

The WITNESS.—No, no.

Q. (Continued.) That he intended to submit for this work before you came.

The WITNESS.—No, sir, I came here ten days ahead of time.

Q. (Continued.) I will say before you came here, or while you were here—

The WITNESS.—While we were here, our work was done jointly; when we differed upon any point, we argued it until we finally agreed.

Q. (Continued.) And did not you insist that the bid prepared by Mr. Hoffman must be reduced several thousand dollars before—

The WITNESS.—Well, Mr. Hoffman never prepared a bid; you are clear off the track. You keep talking about a bid when you mean an estimate; a bid is what you write and give to the water committee what you will do the job for, and an estimate is what you think the job is worth.

Q. (Continued.) Then I will use the technical terms, since you are so particular; that will make it necessary for me to ask another question. Did you not, then, when you came to this city, or while you were here, have estimates prepared for this work as a basis for a bid which proposed to do the work for a considerable sum less than the amount of the bid finally agreed upon by yourself and Mr. Hoffman?

A. No, sir, I did not. Let me tell you, judge, all the time, [251] up to the very evening before these bids were submitted, that

we were receiving telegrams and advices from San Francisco and from New York both on freights and the cost of iron and on the cost of plant to manufacture the iron, and I can show you a hundred and fifty telegrams at least, that cost \$500.00, that were received the last forty-eight hours while I was in Portland.

Q. You say that you had no such estimate that was raised at the instance of Mr. Hoffman?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did not Mr. Hoffman have an estimate prepared by himself as a basis for a bid for the work of which we are speaking, which you required to be reduced, assuring Mr. Hoffman that the work could not be done at those figures, and was not Mr. Hoffman's bid reduced at your suggestion?

A. No, his bid was not reduced; he never made but one bid.

Q. His estimate, then?

A. Well, the facts are these: That after I got to Portland, I think, judge, I can help you along in this, if you want it the way I understand it.

Q. Answer my question; if I don't get it right, you can correct me, but I want to get it just as it is.

A. The facts are these, that there was no definite, final estimate arrived at except the one that was put in the bid, but the other estimates were made jointly, and when I came to Portland, I brought all the data and information that I had gathered, and went into Mr. Hoffman's office, and laid them down on his table, and he at the same time, and in the same place, produced all the data and information that [252] he had gathered, and he had his engineer there, and Mr. Lockwood, an engineer of the San Francisco Bridge Co., and Mr. Hugh L. Cooper, another engineer in the employ of the San Francisco Bridge Co., were all together in the same room, and we had all these papers, and we took the different items in the cost up seriatim, and we argued them whether they were high or whether they were low, and every day we were getting telegrams all letters that caused us to modify sometimes to increase and sometimes to diminish our idea of the cost of each separate part of this work; generally, I would state, that I was low, that is, I insisted that if we were going to bid at all for

this work, we must put in a bold, hard bid; Mr. Hoffman was somewhat inclined to be conservative and the result of our joint judgment as to the lowest price that we should put in was agreed upon about 11 o'clock that night in Mr. Hoffman's office, in the presence of his engineer and our two engineers; on the next day it was written out by Mr. Hoffman's engineer on a blank form, and the bid put in by him. Now, that is substantially the way the bid was evolved.

Q. So, that the idea that we have is that you had come here with a lower bid which was afterwards raised?

A. You have got an erroneous idea that I came here to bid on the job independent of Hoffman; that is not true. On the contrary, it was absolutely agreed between us that we should bid together. Now, it was a question of our agreeing what bid we should put in.

Q. Yet it is true that you brought an estimate here that was lower than Mr. Hoffman's estimate?

53] A. I did not bring an estimate here.

Q. Well, you made one while you were here?

A. I don't think I made a whole estimate without his knowledge.

Q. And he made an estimate that was higher than yours, and he insisted upon yours being raised, and you insisted on his being reduced; is not that true?

A. No, that is not true.

Q. Well, let it stand that way; you afterwards agreed on an estimate?

A. Yes, we afterwards agreed on an estimate for a bid.

Q. And you did bid? A. Yes.

Q. And you afterwards put in another bid that was higher than the bid that you and he had agreed upon?

A. Yes, the San Francisco Bridge Company put in a bid.

Q. What made you put in that bid?

A. Well, I put in that bid because it was known that the San Francisco Bridge Company had got data, and had been figuring on this work; we did not care anything about it.

Q. You did not tell Mr. Failing or Mr. Dodd that that was a mere flyer?

A. I think that Mr. Failing and Mr. Dodd and their engineers before that contract was awarded knew that the San

Francisco Bridge Company and Mr. Hoffman were partners in this job; there was no secret about it.

Q. Did you tell them?

A. I did not tell them then; I told them afterwards.

Q. Told them it was a mere flyer?

[254] A. No, sir; I didn't tell them it was a mere flyer.

Q. You say there was furnished from Seattle some plant which you say was of the value of \$1500.00?

A. Or thereabouts.

Q. Plant belonging to the San Francisco Bridge Company—that they owned? A. Yes, sir.

Q. It was turned over to Mr. Hoffman after you and he had consulted about it, and the price of it was to be what Mr. Hoffman thought it was worth; is not that the fact?

A. Well, it was ordered shipped here.

Q. Did you not give him an estimate of what it was—

A. No, I don't think I gave him an estimate; I think Mr. Lockwood, when he returned to Seattle—well, really, if you want to know the whole thing—

Q. Just answer the question.

A. Well, it was Mr. Foy; after Mr. Hoffman and myself had agreed that Mr. Foy, who had been in our employ, should become superintendent on this work, Mr. Foy went to Seattle, and looked at the San Francisco Bridge Company's plant.

Q. You need not go into all that detail; you can simply state whether the plant came here, and what it was worth.

A. You asked me if I didn't say that Hoffman could have it at his own price and I was selling it to Hoffman.

Q. I just asked you whether you did say so. I will call your attention to some matters that may remind you of it before I get through.

A. I won't dispute that; I am telling you how the plant came here or was sent here.

Q. What is the value of the heater—the rivet heater that was sent up here from San Francisco?

[255] A. What was the value of that? I don't know; I think there was ten or twelve of them; I think eighteen or twenty dollars apiece.

Q. Perhaps \$100 for the lot?

A. Yes, may have been \$25.00 apiece; may have been \$200.00 for the lot.

Q. That was charged up here to Hoffman & Bates?

A. Yes.

Q. Was that ever paid for? A. Yes, I think so.

Q. It was paid for by Mr. Hoffman out of the business here? A. Yes, I think so.

Q. Was the plant that you got from Seattle ever paid for?

A. I don't think so.

Q. Is it not a fact that he sent down money, and the San Francisco Bridge Company refused to accept it?

A. Well, he might; he might have tendered the money after he got ready to "fire me" on the contract; he probably did?

Q. Don't you know he did send down his check for the money, and you people refused to accept it?

A. No, at the time he did, the San Francisco Bridge Company was in the hands of a receiver, and whatever the receiver may have done I do not know.

Q. You say the money, plant, and all amounted to twenty-six or twenty-seven hundred dollars?

A. Possibly.

Q. There was a pair of shears—there was a punch and a pair of shears purchased in the east—in Pittsburg—were not they paid for; didn't Hoffman pay for them?

A. I think not.

Q. Has not the money been paid back to you for them?

56] A. I think not; that is my impression. I think the forges that came from San Francisco were paid for out of the firm money, but I do not think the punch and shears were paid for; I may be mistaken about that.

Q. Did they tender payments for them?

A. No, I don't think so; not to my knowledge.

Q. Now, Mr. McMullen, you say that Mr. Hoffman, at the time he got his bond here on this contract, told you that he did not want you to help furnish any of that bond?

A. Yes, I said so; that is right.

Q. You swear—

A. I offered to go on the bond personally, and Mr. Hoffman said that they would insist on having Oregon men.

Q. And he did not ask you to assist him in furnishing a bond? A. No, sir, he did not; on the contrary—

Q. Do you know the amount of the bond?

A. I think the amount of the bond was something like two hundred thousand dollars.

Q. Mr. Hoffman told you that you need not go on the bond?

A. I went with Mr. Hoffman when he asked the parties to go on the bond.

Q. He told you that he did not want you to assist him in getting this bond, yet he was giving you half of the contract, but he told you that he would furnish this bond without any trouble to you; now you swear to that?

[257] A. I swear that Mr. Hoffman never asked me to furnish any portion of the bond; on the contrary, there was just as many people wanted to go on the bond as you could shake a stick at; that is, figuratively speaking. I asked Mr. Hoffman not to allow a merchant to go on that bond, because a merchant would expect about ten per cent more for his goods than his goods were worth; Mr. Hoffman told me that he had had some parties on his bond before, and he did not think they would overcharge him.

Mr. MALLORY.—Well, you answer a good many more questions than I ask you.

The WITNESS.—Well, you make your questions in such a way that it requires a good deal to answer them.

Mr. MALLORY.—I will give you an opportunity to answer them and not talk so much.

The WITNESS.—I recognize it is a lawyer's privilege to do the talking.

Mr. MALLORY.—I want you to answer my questions; I think you certainly have mistaken your calling if you think it is the business of a lawyer to do the talking.

Q. Now, Mr. McMullen, you say that there were a large number of persons anxious to go on that bond?

A. Well, anxious might be stretching it a little—I will say willing; I won't say a large number, I will say several.

Q. Several persons willing to go on that bond?

A. Yes, sir.

Q. How did you ascertain that?

A. Well, Mr. Hoffman told me so.

Q. Now, with all these people so willing to go on the bond,

your functions in the matter were simply to advise Mr. Hoffman not to take men on that bond that he would be tied up to; is that it?

A. Well, we talked that over; that was my suggestion because—

258] Q. That was really all you had to do in the matter of getting the bond?

A. No, I went with Mr. Hoffman when he asked Mr. De Hart.

Q. Did they know your business?

A. I don't know whether they knew that at all; I think he advised the people I had an interest in it.

Q. Your presence, do you think, was an object that would tend to get signers for the bond?

A. I don't know that, Judge; I have not said so.

Q. How many of the men who signed the bond when you were with him knew that you were a partner?

A. I don't know of any of them signing when I was with him; but he asked some of them to sign when I was with him; the bond was not prepared at that time.

Q. Did any of them ask if you were to be a partner?

A. That was not discussed when they were asked to sign the bond.

Q. In procuring the bond, was that not your part to go around with Mr. Hoffman to see the people?

A. You try to make it appear a very difficult thing to get that bond.

Q. I am asking you a question which I would like to have you answer.

A. Well, that is not the question; you say my part was to go around with him; I say I offered myself to go on the bond, but Mr. Hoffman told me there was plenty of people that he did business with that would gladly go on the bond.

259] Q. Mr. McMullen, had you not reason to believe that, since you are not a resident of this city, and not known to have any property in it, that Mr. Hoffman thought your name would be of any particular advantage on that bond; did you think that?

A. I did not think any thing about that.

Q. So, that when you offered yourself to go on the bond that you did not consider that you were doing more than making a sort of joke of it?

A. I think the bond provided that the signer should qualify in a certain sum of money before a notary public.

Q. You say it was understood that Mr. Hoffman was to do the business here in Oregon—whatever there was here he would do it?

A. We arrived at that conclusion when we determined to put in a bid in his name.

Q. But if there was anything to be done outside, you were to do that in San Francisco, New York, or Seattle?

A. Yes, sir.

Q. That was a part of your agreement that you were to do that? A. That is right.

Q. That is what you said?

A. Yes; you understand, Judge, when this bid was put in—

Mr. MALLORY.—I don't care to go over that again; you have answered my question.

Q. Now, there was considerable conversation between yourself, Risdon, Wolff & Zwicker, and others, about the manner of doing this work after the contract was entered into?

A. I don't think there was any between Wolff & Zwicker no, sir, Wolff & Zwicker made an offer to build the pipe at so much.

[260] Q. You did not have any discussion with Wolff & Zwicker, or Wolff, or any of their firm about what was the necessary plant for you people to have, or how you were to do the work; you did not consult with them?

A. No, I don't think we ever consulted with them.

Q. When you say "we" I will ask you who you mean?

A. When I say "we" I mean Mr. Hoffman and myself.

Q. I will ask you to state if the work that you did on your part in carrying out this work did not consist in consulting Wolff & Zwicker, and Risdon and others about the best way to arrange your plant, and have the business carried on—excavating the ground, and laying the pipe, and so forth.

A. I did considerable of that character of work.

Q. Was that not chiefly what you did? A. No.

Q. What was your chief employment?

A. Well, I think the principal thing that we did, or one of

the principal things which every contractor will recognize as the principal thing, was to get this job.

Q. I am talking about what you did after the contract was signed, Mr. McMullen.

A. Oh, well, we conferred, as one partner would with another, and I did everything that I could do; I furnished, in the first place, a superintendent for the work, and I furnished three or five, or seven perhaps, subsuperintendents from our equipment; I have got plenty of Mr. Hoffman's letters, asking me if I could get such and such a man that could fill that position.

[161] Q. Did you not recommend to Mr. Hoffman Mr. Foy as a proper person to be superintendent? A. I did.

Q. Did you not leave the matter of hiring him entirely to Mr. Hoffman? A. I did.

Q. Now, when you, in your examination-in-chief, say that you furnished these men and a number of foreman whom you mentioned, did you do anything more than simply recommend these people as suitable persons for the place desired of them?

A. I did more; I caused the San Francisco Bridge Company to let these persons go from its employment and go to work for Hoffman & Bates on this pipe line.

Q. Were they not paid as other employees for this work were paid? A. Certainly, I presume so.

Q. Then the San Francisco Bridge Company did not furnish these men at your expense, but they were put on the pay-roll and paid here? A. Judge—

Q. Just answer my question.

A. Certainly, they were paid here, and were on the pay-roll here; it is absurd; let me ask you, Judge—

Mr. MALLORY.—I want you to answer my question.

Q. You say, Mr. McMullen, that you performed everything that was required of you by the terms of this contract, "Complainant's Exhibit No. 1"; it is provided here that each should receive one-half of the profits, or bear one-half of the losses which should result therefrom; I would like to ask you whether or not if you understood when this contract was prepared that you were to furnish part of the money necessary to carry on the business?

(Counsel for complainant objects to the question as incompetent.)

A. I expected to furnish part of the money.

[262] Q. I will now ask you to state if you did furnish your portion of the money as it was required to carry on this business?

(Counsel for complainant objects to the question as immaterial.)

A. I furnished and paid several bills on account of that job.

Q. That is not my question; please answer my question.

A. Well, the words, "your proportion of the money," is a relative term.

Q. You may state whether you did or not.

(Same objection.)

A. If by "proportion of the money" you mean if, whenever Mr. Hoffman said he wanted ten thousand dollars of me that I forthwith sent it to him—no, I did not; if by "proportion of the money" you mean money actually required in the conduct of the business, I should say yes.

Q. Do you not know, as a matter of fact, that Mr. Hoffman advanced out of his own money, and was required to advance out of his own money, at least fifteen thousand dollars to carry on that business?

(Same objection.)

A. I know that before this job—

Q. Just answer my question.

A. I don't know it.

Q. Were you ever informed so by Mr. Hoffman?

A. I may have been but I did not believe it.

Q. Don't you know that he told you so repeatedly?

A. No, I don't know that he told me so repeatedly.

Q. Don't you know that he advised you so by letter?

A. No, I don't think he did.

[263] Q. Will you swear that he did not?

A. I will not swear; the letters are the best evidence of those matters.

Q. Now, then, did not Mr. Hoffman, while he was carrying on that business, notify you that ten thousand dollars would

be necessary for you to put up to meet the bills and debts due on account of the business?

(Counsel for complainant objects to the question, and all others of similar import, on the ground that the same are immaterial.)

A. Mr. Hoffman when he first—

Q. Just answer my question.

A. I am going to answer it—well, he notified me of that at a time when by his own letters I knew there was not a dollar required.

Q. I am asking you what the facts were.

A. He notified me that.

Q. You did not send the money, or did not give the money to him as he requested, did you, Mr. McMullen?

A. I sent money to him on account of this job, and paid bills and notified him that I paid them.

Q. Mr. McMullen, when you were notified by Mr. Hoffman that the contract of this business was such as to require ten thousand dollars from you without delay, did you, or did you not, furnish the money?

A. I did not furnish the money, because I knew he was misrepresenting the facts to me.

Q. I did not ask the reason why; but you did not furnish the money?

A. That is the reason I did not furnish it.

264] Thereupon the further examination of this witness is adjourned until January 10th, 1896, at 2 o'clock P. M.

[Signed]

GEO. A. BRODIE,

Examiner.

Office of Geo. A. Brodie, U. S. Examiner, Portland, Oregon, January 10th, 1896, 2 P. M. At this time appears the complainant herein by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory, of counsel, and thereupon the following proceedings were had, to-wit:

Mr. JOHN McMULLEN resumes the stand for further cross-examination.

Questions by Mr. MALLORY:

Q. You did not, as a matter of fact, furnish any money for

carrying on this contract by paying it into any treasurer or to Mr. Hoffman for that purpose?

(Objected to by complainant's counsel as immaterial.)

A. I paid bills.

Q. That does not answer my question. I asked you if you paid it to Mr. Hoffman.

A. Yes, I furnished money, but did not pay any money to Mr. Hoffman or into any treasurer because the company never had any treasurer. I furnished it to pay bills with on account of this job.

[265] Q. There was a plant owned by the San Francisco Bridge Co. that was turned over to Mr. Hoffman for the purpose of carrying on this contract, was there not? A. There was.

Q. There was an hydraulic punch and some shears purchased in the east—at Pittsburg, I believe—that was paid for by yourself or by the San Francisco Bridge Co., was there not?

A. There was.

Q. What other material or supplies did you furnish toward carrying on this work?

A. We furnished some portable forges for heating rivets that were purchased in San Francisco and shipped to Portland and used on this work. Besides the punch and shears referred to as having been purchased in the east there was some other items at the same time—some other things, tools, besides the punch and shears. I cannot tell exactly what they consisted of without looking up the inventory or bill for these tools.

Q. What was the entire value of the punch, shears, and tools?

(Same objection.)

A. I think between \$1,400.00 and \$1,700.00.

Q. What was the cost of the plant from Seattle—the value of the plant from Seattle?

A. Well, that is what I am giving you. You asked me for the value of the shears, punch, and tools.

Q. I mean the tools that you named; you said there were some tools connected with the shears and punch; I had reference to that.

A. I do not know. If that is what you mean I will have to change my answer.

Q. I do not refer to the Seattle plant; I refer to the punch, shears, and tools to which you refer.

A. I think the value of the punch and shears and other tools in that invoice was in the neighborhood of \$300.00.

[266] Q. Instead of \$1,700.00?

A. Yes, I think the value of the Seattle plant was in the neighborhood of \$1,300 or \$1,400.00.

Q. Then you did not pay any money to Mr. Hoffman or to any person for his use for the purpose of carrying on this business except that which you have mentioned?

A. Well, when you say for his use—

Q. I say for his use in connection with this business.

A. Well, for instance, we repaid the freight on the tools that were shipped over here from Seattle, I think, and we paid the expenses of getting those tools out; hauling them and shipping them. We paid one bill in New York to Mr. Clemens Hirshell of \$750 for his opinion and knowledge and experience in the doing of this kind of work and in the cost of this kind of work. I mean by this kind of work, steel conduit or pipe line.

Q. This was an expenditure, this \$750.00, made long before the contract was let by the city or the water committee?

A. Well, the employment of Mr. Hirshell might have been before, but some of the services were rendered after the awarding of this contract by the city of Portland. Mr. Hirshell had been superintendent and engineer on the Jersey City Water Works which was then nearing completion and which was some thirty-four miles of steel conduit substantially like the Bull Run Water Line, and Mr. Hirshell had full knowledge of the cost of that work and of the difficulties encountered in its construction, and was qualified to give us very valuable advice as to the mechanical construction of that pipe line.

[267] Q. Was his employment agreed upon between yourself and Mr. Hoffman?

A. Mr. Hoffman knew of it and approved of it and audited the bill of \$750.00, which we paid him.

Q. When you say "we," who do you mean?

A. I mean the San Francisco Bridge Company paid him and Mr. Hoffman approved the bill and audited it.

Q. Has it been paid by Mr. Hoffman out of the proceeds of this work?

A. It has not.

Q. Mr. Hoffman audited and approved this bill as a bill due to the San Francisco Bridge Company for money paid by them to Mr. Hirshell on account of advice and services he had furnished, is that it?

A. Well, I think he audited it when it was rendered, but he never said anything about paying it till he got ready to appropriate this contract to himself and to deny my rights in the premises. Then he considered it as a bill paid by the San Francisco Bridge Company. But certainly that was not the true status of this claim.

Q. My question was, Mr. McMullen, whether he audited that bill with a view of approving it and having the money paid out of the proceeds of this contract either to Mr. Hirshell or to the San Francisco Bridge Company.

A. Yes, he recognized and audited it as a just and proper bill to be paid.

Q. Out of the proceeds of this business? A. Yes.

Q. To the San Francisco Bridge Company or to Mr. Hirshell?

A. Well, we paid Mr. Hirshell, consequently it was in reality a contribution by the San Francisco Bridge Company towards the construction of this work—a moneyed contribution, [268] that is what it was. That is what we are talking about. Just as much as if Mr. Hoffman hired a superintendent and paid him some of Mr. Hoffman's own personal money.

Q. And when the bill was allowed by Mr. Hoffman the purpose was to have that amount acknowledged by Mr. Hoffman as property payable out of the proceeds of this contract either to Mr. Hirshell or to the San Francisco Bridge Company?

A. Well, I cannot answer that question; I do not know what was in Mr. Hoffman's mind.

Q. Why was the bill submitted to Mr. Hoffman for his approval and why was it allowed by him?

A. It never was submitted for his approval. When we spent any money on account of this job we notified Mr. Hoffman what we had spent and what it was for and sent him a copy of the bill.

Q. Why was this bill presented to him to be audited?

A. It was not presented to him to be audited. He never chose to audit it until nearly a year after it was presented or

more, when he made up his mind to get me out of this contract; then he proceeded to consider it as a bill, and directed it to be paid, but that was not the nature of it originally.

Q. What do you mean, then, by the answer you have already made that this bill was audited and allowed by Mr. Hoffman?

A. I mean that he recognized that we had contributed so much money towards the doing of this job that there was no dispute about it.

269] Q. Is it not a fact that Mr. Hoffman had been advised by you or by the San Francisco Bridge Company that Mr. Hirshell had been consulted with a view of procuring information upon which to base your bids, that his charge for that service was \$750.00, that the San Francisco Bridge Company had paid that bill, and that that company was entitled to receive from the proceeds of this contract the amount of money so advanced by them?

(Objected to by complainant as immaterial.)

A. It was not. Mr. Hirshell's advice did not relate only to the cost of this work; it related equally to the proper, best, and most economical manner of constructing the work. Now, I will answer the rest of the question; read it. [Question read to witness by the examiner.] Well, really, I do not know how to answer that question. I have stated that it was not for the purpose solely of ascertaining the cost of this work before bidding, but also for services and advice as to the best mode of handling the contract. Now, the status of the payment was as I have said—the San Francisco Bridge Company engaged him—

Mr. MALLORY.—That is not responsive to the question.

The WITNESS.—Well, the question is so long I cannot answer it.

Mr. MALLORY.—I can perhaps make the question shorter.

Q. Mr. Hirshell performed some services of various kinds in the way of furnishing information regarding the cost and execution of this work.

A. That is correct.

Q. For which he charged \$750.00, and that sum was paid by the San Francisco Bridge Company?

A. That is correct.

Q. Now, this bill was submitted afterwards to Mr. Hoffman with the expectation that it would be charged as a part [270] of the expenses of this contract and paid for to the San Francisco Bridge Company out of the proceeds of the contract, was it not?

A. Paid for as any other bill on account of this contract.

Q. Mr. McMullen, a considerable portion of the work you did in relation to this contract was done in trying to procure it, was it not?

A. If by trying to procure it you mean getting accurate information as to its costs and estimating what it was worth, my answer is in the affirmative—yes.

Q. The services you did before the contract was awarded was greater both in amount and importance than what you did after it was awarded and the written contract, Exhibit No. 1. was entered into, was it not?

A. Well, I am not prepared to put on so short a notice a correct value to what we did before the execution of the written contract and what we did after. There is no question but what we rendered valuable services before the making of the written contract, nor is there any doubt that we contributed very largely to the successful construction of the work. I would like to say right here, Judge, that—

Mr. MALLORY.—It would be better probably for you to confine what you have to say to answering my questions.

The WITNESS.—Let me answer a little further, then.

A. (Continued.) Let me say it was the services that we contributed before the signing of the agreement and contract which made it successful. In other words, if it had not been for the services that we rendered Mr. Hoffman would never [271] have had this contract to do. Mr. Hoffman has admitted that, and we can prove it beyond a doubt that he gave us the credit of securing this contract absolutely.

Q. You have had considerable correspondence in one way and another with Mr. Hoffman about this contract, have you not?

A. Yes, sir; I think about 275 or 300 letters and telegrams.

Q. I call witness' attention to a letter dated San Francisco, December 31, 1892, addressed to Lee Hoffman, and ask you if that is your signature. (Showing letter to witness.)

A. That is my signature, sir.

(Counsel for defendant offers in evidence the letter shown the witness. The same is objected to by complainant's counsel as immaterial and not proper cross-examination. The letter referred to is received and filed, marked "Defendant's Exhibit A." G. A. B., Examiner.)

(It is admitted between counsel for complainant and defendant, for the sake of convenience, that all other exhibits pertaining to matters which transpired before the execution of the agreement "Complainant's Exhibit No. 1," which may be offered in evidence by defendant, may be considered as objected to, on the ground, where no other specification is made, that the same are immaterial and not proper cross-examination.)

Q. I show witness another letter dated San Francisco, January 26th, 1893, addressed to Lee Hoffman, and ask if that is your signature.

A. That is my signature, sir.

(Counsel for defendant offers in evidence the letters last shown the witness and the same is received and filed, and marked "Defendant's Exhibit 'B'." G. A. B., Ex.)

Q. I show witness another letter, dated San Francisco, February 6, 1893, addressed to Mr. Lee Hoffman, and ask if that is your signature.

A. That is my signature.

(Counsel for defendant offers in evidence the letter last shown the witness and the same is received and filed, marked "Defendant's Exhibit C." G. A. B., Ex.)

Q. I now show witness another letter dated San Francisco, February 8th, 1893, addressed to Mr. Lee Hoffman and ask if that is your signature.

A. That is my signature to that letter.

(Counsel for defendant offers in evidence the letter last shown the witness and the same is received and filed, marked "Defendant's Exhibit D." G. A. B., Ex.)

Q. I show witness a letter, dated San Francisco, Feb. 13th, 1893, addressed to Mr. Lee Hoffman, and ask if that is your signature attached to that letter.

A. That is my signature.

(Counsel for defendant offers in evidence the letter last

shown the witness and the same is received and filed, marked "Defendant's Exhibit E." G. A. B., Ex.)

Q. I show witness another letter, dated San Francisco, March 8th, 1893, addressed to Mr. Lee Hoffman, and ask if the signature attached to that letter is his signature.

A. That is my genuine signature.

[273] (Counsel for defendant offers in evidence the letter last shown the witness and the same is received and filed, marked "Defendant's Exhibit F." G. A. B., Ex. Counsel for complainant objects to the evidence contained in this letter, as it has no reference to this matter, that is, Exhibit 1 of complainant, or to the work which was to be done thereunder by the complainant and defendant, as being irrelevant and immaterial.)

Q. I show witness a letter, dated San Francisco, March 14th, 1893, addressed to Mr. Lee Hoffman, and ask if that is your signature?

A. The signature is my signature.

(Counsel for defendant offers in evidence the letter last shown the witness. Counsel for complainant objects to so much of this letter as refers to matters other than the work being done by the complainant and defendant in the execution of the contract, Exhibit 1, as to so much of it as refers to any matter that took place between them prior to the execution of this contract, Exhibit 1, as being immaterial, irrelevant, and not proper cross-examination. The letter referred to is received and filed, marked "Defendant's Exhibit G." G. A. B., Ex.)

At this time, by consent of counsel, the examination of Mr. McMullen is suspended so as to allow the complainant to recall Mr. F. T. Dodge.

F. T. DODGE, is recalled as a witness for the complainant.

Direct Examination (Continued).

Questions by Mr. L. B. COX:

Q. I will ask you if you have made an examination as to the [274] entries in the books of the water committee touching extra work? A. I have.

Q. Apart from that covered by "Complainant's Exhibit No. 2," performed by Hoffman for the purpose of bringing Bull Run water to the city of Portland? A. Yes.

Q. Please state what you have found in the way of such entries.

A. I have prepared a statement of all the entries. This statement is headed, "Statement of all amounts paid to Hoffman & Bates by the water committee of the city of Portland, Oregon, from March 10th, 1893, when the contract for 'Mafg & Laying Steel Conduit' of the Bull Run Water Works was signed to January 7, 1896." The date of each payment, the number of each voucher, and the character of the work or material is given. (Witness produces statement referred to.)

Q. I will ask you to state from what you made up the statement of account which you have just produced.

A. From the vouchers, bills, and receipts of Hoffman & Bates, and from the entries in the books of the water committee.

Q. By whom were they prepared or kept?

A. The accounts were all kept by me.

Q. I understand that you have personal knowledge of the accuracy of the records from which you have taken this statement. A. I have.

(Counsel for complainant offers in evidence the statement which has been produced by the witness and identified by him in this matter, as showing the amounts which were actually [275] paid by the water committee of the city of Portland to Lee Hoffman on account of the contract, "Complainant's Exhibit No. 2," and also the amounts which were actually paid by the city of Portland to said Hoffman on account of extra work performed in connection with said contract for the purpose of bringing Bull Run Water to the city of Portland. Counsel for defendant reserves the right to make any objection to the competency of this testimony until to-morrow, but makes no objection on account of the nonproduction of the original evidence. The document referred to is received and filed in evidence, marked "Complainant's Exhibit No. 4," G. A. B., Ex.)

Q. I will ask you some questions in regard to that just at this juncture: You may describe the connection which the items you have described here as extra work bear to the items

designated as falling strictly under the contract, "Complainant's Exhibit No. 2"?

A. You wish to ask me what items, or shall I go on in a general way?

Q. Just in a general way.

A. There was an item, for instance, of "grubbing." The committee in advertising for bids for the work of excavating and laying of this pipe stated in the specifications that the right of way, 33 1-3 feet wide, had been cleared and grubbed. They supposed that had been thoroughly done, but there were places where they found that it had not been grubbed as it should be properly, and Hoffman & Bates were allowed extra money for doing that grubbing. It was also stated that roads had been completed. In some instances it was found that the roads were not wide enough for the teams of Hoffman & Bates [276] in hauling, and they widened the roads so as to make them passable for their teams. That was allowed as extra work. There was an item there for removing slides that was not in the contract; that was extra work. Then there was extra material; in filling in on the pipe it was found that the boxes in the man-holes, blow-offs, and other inlets should be placed in position as rapidly as the earth was refilled in the trench, and to save time, instead of making a separate contract with some other parties, as long as Hoffman & Bates had teams right along on the road, they were allowed payment for these boxes, so much for each box, furnishing the material and labor to make them up and put them in position. Those were not specified in the contract. There was also items for building flumes to carry off streams which would otherwise have flooded the trench during the severe rains that was not contemplated in the contract. There was also some items of supplies. The committee had men at work on their works, such for instance as the head works and the canal which Hoffman & Bates had nothing to do with. The committee bought in one instance a couple of tents and some picks and shovels from the commissary storeroom of Hoffman & Bates because it would save time and Hoffman & Bates carried on or kept a sort of store at the end of the line, and it would save several days by buying from them, instead of sending to town for them.

Q. I will ask you to state generally whether the items you have just been describing pertained to the matter of bringing

Bull Run water to the city of Portland, in connection with the contract, "Complainant's Exhibit No. 2"?

A. Entirely so.

[277] Q. I will ask you to state whether or not you have made any examination to determine whether there are other items in your books or which have been presented to the committee by Hoffman for compensation for extra work in line with that we have just been considering, which claims have been disallowed by the committee or are held in suspense?

A. I have no record other than reports of the engineer to the water committee of claims which he has recommended to be disallowed. I have no record of them other than his reports. Perhaps I might explain. The engineer would submit to the committee a claim, for instance, of Hoffman & Bates for \$1,000.00, and he would recommend that, say, \$500.00 of it be paid, and \$500.00 of it rejected. The committee would then pass upon it, and as they would decide they would order a voucher drawn either for the \$500.00 or \$750.00, or whatever they might decide upon. But almost without exception the committee was guided by the recommendation of the engineer. In fact, I do not recollect an instance where his recommendation was deviated from. The records of the engineer's office, his letter books and files would give that much more clearly than I could possibly do.

Q. These claims, then, were not filed with you as clerk of the water committee?

A. They were presented to the engineer, and the engineer in his report would usually submit these bills attached to his report. But I cannot say that all of them are in my possession. Some were referred back to the engineer and remain with him.

[278] Q. I will ask you to state what, if anything, you may know about a certain estimate which was paid in September, 1893, as to what notice was given to Hoffman or Hoffman & Bates, if any, as to the anticipation the water committee had prior to the maturity of that payment in regard to its ability to meet it.

A. I will read from the records of the water committee meeting held on August 15th, 1893, page 300, "Chairman Failing stated that the committee would have enough money to pay on August 20th, according to contract, for all work and

material furnished during July, but it was not certain in the present demoralized condition of the money market whether Harris & Company, who have a contract for the option, will take the bonds and furnish funds necessary to pay on September 20th for the work and material furnished during August, estimated at \$99,000.00. It was voted not to award any contracts for the above at present." (This "above" refers to pipes, for cast-iron pillars for Sandy River, etc.) "But to refer all proposals to the engineer to be tabulated." That is an extract. This is another extract—

Q. From the same meeting?

A. Another meeting on Sept. 7th, 1893. p. 301: "Chairman Failing stated that he had called the meetng in order that the committee might consider their financial condition and decide about letting more contracts." Then there is a matter which does not relate to this, then it proceeds: "After a general discussion of finances the committee voted not to let any contracts for reservoirs at present. The clerk was authorized to return certified checks which accompanied proposals." Then [279] I skip another paragraph that does not relate to this matter, then comes this paragraph: "Mr. Lee Hoffman, one of the principal contractors was invited into the room and informed fully as to the financial situation. After some discussion, on motion of Mr. Lewis, the committee adjourned." The business of the water committee being public business, it has always been customary for the reporters for at least one paper, generally two or three, to take minutes of the meetings. I have always kept a scrap-book which I use as a sort of supplement to my record. The "Oregonian" of September 8th. (Here the witness produced an extract purporting to be from the "Oregonian.")

Mr. MALLORY.—I object to the witness reading anything from the "Oregonian."

Q. What I want you to explain is whether any communications had been made to Mr. Hoffman at the time when it was ascertained these funds would be on hand.

A. Yes, one time.

Q. That is the one I want.

A. The only communication was that I sent word to him that the funds had unexpectedly arrived that day, and I had his warrant for the full amount, some \$66,000.00, ready for him

on the 20th of September. On the 19th of September I drew warrants in favor of all the contractors for 30 per cent, being the total amount of money the committee could pay on its different contracts, and on the 19th, in the evening of that day, Harris & Co., of Chicago, telegraphed the water committee that they would furnish \$100,000.00. The warrants that I had drawn were not given to the contractors, but were canceled, and warrants for the full amount according to contract issued and paid in their place.

Q. Referring to "Exhibit No. 4," I will ask you to state whether or not the items therein listed as based upon extra work represent the gross allowance for such work, or is there a percentage held on them as well as on the original contract.

A. No percentage on the extra work.

No cross-examination.

Witness excused.

Mr. McMULLEN now resumes the stand.

Cross-Examination (Continued).

Questions by Mr. R. MALLORY:

Q. I will show you a letter, dated San Francisco, March 20th, 1893, addressed to Lee Hoffman, and ask you if that is your signature attached to that letter.

A. That is my signature.

Q. And the postscript? A. Yes, all of it.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit H," G. A. B., Ex.)

Q. I show the witness a letter, dated San Francisco, March 18th, 1893, and the signature thereto, and I ask whether that is your signature.

A. The signature is mine.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The letter referred to is received and filed, marked "Defendant's Exhibit I," G. A. B., Ex.)

Q. I show witness a letter dated San Francisco, March 24th, 1893, addressed to Lee Hoffman, and ask whether the signature attached to that letter is your signature.

A. That is my signature.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit J," G. A. B., Ex.)

Q. I show the witness a letter dated San Francisco, March 27th, 1893, and the signature, and I ask whether it is your genuine signature.

A. The signature is genuine.

(Counsel for defendant offers in evidence the letter last shown the witness, and the same is received and filed, marked "Defendant's Exhibit K," G. A. B., Ex. No objection.)

Q. I show witness a letter, dated San Francisco, April 30th, 1893, addressed to Lee Hoffman, signed John McMullen, and ask if that is your signature.

A. That is my signature.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit L," G. A. B., Ex.)

Q. I show witness a letter, dated San Francisco, April 18th, 1893, and ask if the signature thereto is your genuine signature? A. It is.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit M," G. A. B., Ex.)

[282] Q. I show you a letter, dated San Francisco, April 22, 1893, and the signature thereto, and ask you if that is your genuine signature. A. The signature is genuine.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit N," G. A. B., Ex.)

Q. I show you a letter, dated San Francisco, May 12th, 1893, and ask if the signature is your genuine signature.

A. That is my signature.

(Counsel for defendant offers in evidence the letter last shown the witness. No objection. The same is received and filed, marked "Defendant's Exhibit O," G. A. B., Ex.)

Q. I show you a letter, dated San Francisco, May 18th, 1893, and ask you if that is your genuine signature attached to that letter. A. It is genuine.

(Counsel for defendant offers in evidence the letter last shown the witness. Counsel for complainant objects to this letter as being irrelevant in respect to everything therein contained except the paragraph, "Have you heard from Foy yet. How does it look for starting the work early in June?" The letter referred to is received and filed, marked "Defendant's Exhibit P," G. A. B., Ex.)

Q. I show witness a letter, dated San Francisco, June 6th, 1893, and ask if that is his signature. A. It is.

(Counsel for defendant offers in evidence the letter last shown the witness. The same is received and filed, marked "Defendant's Exhibit Q." Counsel for complainant objects to the passage contained in this letter commencing with "with regard" and terminating with "you think it will take," to the money matters next to the last paragraph on the second page, on the ground that it is immaterial.)

Q. Witness is shown a letter, dated San Francisco, June 15th, 1893, and is shown the signature, and is asked if that is his genuine signature. A. It is.

(Counsel for defendant offers in evidence the letter last shown the witness. Complainant objects to the 1st, 2nd, and 3d paragraphs on the second page of the letter, on the ground that the matter therein contained is immaterial. The letter referred to is received and filed, marked "Defendant's Exhibit R," G. A. B., Ex.)

Q. Witness is shown a letter, dated San Francisco, July 6th, 1893, and asked whether the signature thereto is his genuine signature. A. It is.

(Counsel for defendant offers in evidence the letter last shown the witness. Complainant objects to the subject matter of this letter commencing with the words, "Now, Lee as to finances." near the bottom of the first page, and concluding with the words, "We will do our part towards executing it." on the 3d page, on the ground that the same is immaterial. The letter referred to is received in evidence, filed, and marked "Defendant's Exhibit S," G. A. B., Ex.)

Q. There is a postscript to this letter which is signed by you, is that your genuine signature? A. Yes.

(Counsel for defendant offers in evidence the postscript to the letter above introduced. Objected to by complainant on

[284] the same ground made above to a portion of the letter, and on the ground that it is irrelevant. The postscript referred to is received in evidence, filed, and marked "Defendant's Exhibit S," G. A. B., Ex.)

Thereupon the taking of testimony herein is adjourned until Monday, Jan. 13th, at 10 A. M.

Office of Geo. A. Brodie, U. S. Examiner, Portland, Oregon.

January 18th, 1896, 10 o'clock, A. M.

At this time appears the complainant herein by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

Mr. JOHN McMULLEN resumes the stand for further

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. I show the witness a letter, dated San Francisco, July 22d, 1893, and ask if the signature is his genuine signature.

A. Yes, the signature is genuine.

(Counsel for defendant offers the letter referred to in evidence; objected to by counsel for complainant, and portions objected to commencing with the second line from the bottom of the second page, and concluding with the third line from the bottom of the third page, on the ground that all of said [285] portion is immaterial; the letter referred to is received and filed, marked "Defendant's Exhibit T," G. A. B., Examiner.)

Q. The witness is shown a letter, dated San Francisco, July 24th, 1892, and I would ask if the signature, "San Francisco Bridge Co.," by John McMullen, President, is your genuine signature.

A. Yes, sir.

(The letter referred to is offered in evidence; objected to on the ground that the same is immaterial; the same is received and filed, marked "Defendant's Exhibit U," G. A. B., Examiner.)

Q. I show the witness a letter, dated August 3d, 1893, and ask whether the signature is your genuine signature.

A. Yes, sir.

(Counsel for defendant offers the letter referred to in evi-

dence; objected to as immaterial; the same is received and filed, marked "Defendant's Exhibit V," G. A. B., Examiner.)

Q. I show the witness a letter, dated San Francisco, August 4th, 1893, and ask you whether the signature is your genuine signature. A. Yes, sir.

(The counsel for defendant offers the letter referred to in evidence.)

Mr. COX.—I object to paragraph on 2nd page, commencing with the words, "I hope the committee," on the ground that it is immaterial, and I object to the portion of the letter commencing with the last line of the 2nd page down to and including the words, "our camp," near the bottom of the 3d page, on the ground that it is irrelevant, and I object to the portion of the letter succeeding the passage last objected to, to its conclusion, on the ground that it is immaterial. (The
286] letter is received and filed, marked "Defendant's Exhibit W," G. A. B., Examiner.)

Q. I show the witness a letter dated San Francisco, September 14th, 1893, and ask whether the signature is the witness' genuine signature. A. Yes, sir.

(The letter referred to is offered in evidence.)

Mr. COX.—I object to the paragraph near the bottom of the page 2, commencing with the words, "My own finances," down to and including all that paragraph on the 3d page, and the paragraph at the bottom of the 3d page, commencing with the words, "I have heretofore," down to the conclusion of that paragraph on the grounds that it is immaterial. (The letter referred to is received and filed, marked "Defendant's Exhibit X," G. A. B., Examiner.)

Q. The witness is shown a letter, dated San Francisco, September 18, 1893, addressed to Lee Hoffman, and I show the signature to the witness, and ask the witness if that is his genuine signature. A. It is.

(Counsel for defendant offers the letter referred to in evidence; no objection; the same is received and filed, marked "Defendant's Exhibit C2," G. A. B., Examiner.)

Q. Are you acquainted with the signature of Lee Hoffman?
A. Yes, sir.

Q. The witness is shown a letter, dated Portland, Oregon.

January 23, 1893, and shown the signature, and I ask the witness if he knows whose signature that is.

A. Yes, sir, that is Lee Hoffman's.

Q. I will ask you if this letter was received by you at San Francisco, in due course of the mail. A. Yes, sir.

[287] (Counsel for defendant offers the letter referred to in evidence; objected to as immaterial, and not proper cross-examination; the letter is received and filed, marked "Defendant's Exhibit Z," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, January 30th, 1893, addressed to John McMullen, and signed Lee Hoffman, and ask you if you know whose signature that is.

A. Yes, it is the signature of Lee Hoffman.

Q. I ask if this letter was received by you in due course of mail, at San Francisco. A. Yes, sir.

(Counsel for defendant offers the letter referred to in evidence, also the paper attached thereto objected by counsel for complainant on ground as above stated; the same is received and filed, marked "Defendant's Exhibit A2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, February 3, 1893, addressed to J. McMullen, and asked if the signature is the genuine signature of Lee Hoffman.

A. It is.

Q. I ask if that letter was received by you in due course of mail, at San Francisco. A. It was.

(Counsel for defendant offers in evidence the letter referred to; same objection; the same is received and filed, marked "Defendant's Exhibit B2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland Oregon, February 8, 1893, addressed to J. McMullen, San Francisco, signed by Lee Hoffman, and I ask if it is the genuine signature of Lee Hoffman. A. Yes, sir.

[288] Q. Was it received by you at San Francisco in due course of mail? A. Yes, sir.

(Counsel for defendant offers the letter referred to in evidence; same objection; the letter is received and filed, marked "Defendant's Exhibit C2," G. A. B., Examiner.)

Q. I show the witness a letter, dated Portland, February 11, 1893, addressed to J. McMullen, San Francisco, and is

shown the signature, and I ask if that is the genuine signature of Lee Hoffman. A. Yes, sir.

Q. I will ask you if you received that letter in due course of mail, at San Francisco. A. I did.

(Counsel for defendant offers in evidence the letter referred to; same objection; the letter is received and filed, "Defendant's Exhibit D2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, March 10, 1893, addressed to J. McMullen, San Francisco, California, and signed Lee Hoffman, and I ask if you know whose signature that is.

A. Yes, it is Lee Hoffman's signature.

Q. Was this letter received by you in due course of the mail, at San Francisco? A. Yes, sir.

(Counsel for defendant offers the letter referred to in evidence; counsel for complainant objects to the 2nd paragraph from the end of the 1st page, commencing with "Hope that," and the 1st, 2nd, and 3d paragraphs of the 2nd page, on the ground that the matters therein contained are irrelevant; the letter is received and filed, marked "Defendant's Exhibit E2," G. A. B., Examiner.)

Q. I show the witness a letter, dated Portland, Oregon, March 21, 1893, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman and would ask if that is his genuine signature. A. Yes, sir.

Q. Did you receive this letter in due course of the mail at San Francisco? A. I did.

[289] (Counsel for defendant offers in evidence the letter referred to; no objection; the same is received and filed, marked "Defendant's Exhibit F2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, March 27, 1893, addressed to J. McMullen, San Francisco, California and signed Lee Hoffman, and I ask if that is the genuine signature of Lee Hoffman.

A. Yes, sir, it is.

Q. Did you receive that letter in due course of the mail, at San Francisco? A. I did.

(Counsel for defendant offers the letter referred to in evidence; no objection; the same is received and filed, marked "Defendant's Exhibit G2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, April 3, 1893, addressed to J. McMullen, San Francisco, California, and shown the signature, and asked if he knows whether that is the genuine signature of Lee Hoffman.

A. Yes, sir, it is.

Q. Did you receive that letter in due course of mail at San Francisco? A. Yes, sir, I did.

(Counsel for defendant offers the letter referred to in evidence; no objection; the same is received and filed, marked "Defendant's Exhibit H2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, April 14th, 1893, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman, and asked if that is the genuine signature of Lee Hoffman. A. Yes, sir.

Q. Did you receive that letter in due course of the mail, at San Francisco? A. I did.

(Counsel for defendant offers in evidence the letter referred to; no objection; the same is received and filed, marked "Defendant's Exhibit I 2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, April 20, 1893, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman, and asked if that is the genuine signature of Lee Hoffman. A. Yes, sir.

Q. I ask you if you received that letter in due course of the mail at San Francisco? A. Yes, sir.

(Counsel for defendant offers in evidence the letter referred [290] to; no objection; the same is received and filed, marked "Defendant's Exhibit J2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, May 1, 1893, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman, and I ask you if that signature is the genuine signature of Lee Hoffman. A. Yes, sir.

Q. I ask you if that letter was received by you in due course of the mail, at San Francisco? A. It was.

(Counsel for defendant offers the letter referred to in evidence; no objection; the same is received and filed, marked "Defendant's Exhibit K2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, June 9, 1892, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman, and the witness is asked if the

signature of Lee Hoffman is the genuine signature of Lee Hoffman. A. It is.

Q. To this letter is attached a schedule of prices, and is addressed to J. McMullen, Esq.; was this letter received by you in due course of the mail at San Francisco?

A. It was.

[1] (Counsel for defendant offers in evidence the letter and schedule attached; no objection; the same is received and filed, marked "Defendant's Exhibit L2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, June 20th, 1893, addressed to J. McMullen, San Francisco, California, signed Lee Hoffman, and asked if the signature is the genuine signature of Lee Hoffman. A. Yes.

Q. I ask whether this letter was received by you in the due course of mail, at San Francisco. A. It was.

(Counsel for defendant offers in evidence the letter referred to; no objection; the same is received and filed, marked "Defendant's Exhibit M2," G. A. B., Examiner.)

Q. The witness is shown a letter, dated Portland, Oregon, July 17th, 1893, addressed to John McMullen, San Francisco, California, signed Lee Hoffman, and asked whether the signature of Lee Hoffman is his genuine signature.

A. Yes, sir.

Q. I ask whether you received that letter in due course of the mail at San Francisco. A. I did.

(Counsel for defendant offers in evidence the letter referred to; counsel for complainant objects to that portion of the letter commencing with the words, "I am not finding fault," about the middle of the 2nd page, down to the conclusion of paragraph in which said words occur, on the ground that the matter therein contained is immaterial. The letter is received and filed, marked "Defendant's Exhibit N2," G. A. B., Examiner.)

[2] Q. The witness is shown a letter, dated Portland, Oregon, July 20th, 1893, addressed to John McMullen, San Francisco, California, signed Hoffman, "Bates, per Lee Hoffman," and I ask you if the signature of Lee Hoffman is his genuine signature. A. Yes, sir.

Q. Was this letter received in due course of the mail at San Francisco? A. It was.

(Counsel for defendant offers in evidence the letter referred

to and the same is received without objection, and marked "Defendant's Exhibit O2," G. A. B., Examiner.)

Q. The witness is shown a press copy of letter dated July 31, 1893, addressed to John McMullen, San Francisco, California, and signed Lee Hoffman, and I ask you whether the signature is the genuine signature of Lee Hoffman.

A. It is.

Q. I ask you whether the original of this press copy was received by you in due course of mail, at San Francisco?

A. It was, I think.

(Counsel for defendant offers in evidence the letter referred to; counsel for complainant objects to all of this letter except the first paragraph, on the ground that the matters therein contained are immaterial; the letter referred to is as follows, and is marked by the examiner "Defendant's Exhibit P2," G. A. B., Examiner.)

"July 31, 1893.

JOHN McMULLEN, Esq., 42 Market Street, San Francisco, Cal.

Dear Sir: I send you to-day under separate cover specifications and profile plan for the submerged pipe. The reason I did not send it sooner was that I had no profile of the river, and Colonel Smith told me he had sent you specifications. I have not paid any attention to it yet; as things now look, I don't think I shall bid on it.

Now, Mac. I want to tell you once more about the money matters up here. I have now put into this thing \$15,100 in cash, and to-morrow there will not be a dollar left if we pay our bills as we always have done heretofore. Now, there is no use of your repeating the proposition to borrow money up here, as your bridge stock and all the collateral I have got with our notes attached would not borrow \$20,000.00, nor would I undertake to raise \$5,000.00 here now, nor could we have done it within the last forty days. It is a good deal for you to ask of me, to take this work and run it and furnish all the money, and not do anything else. You are taking work all over the country, putting your money into other work, and I cannot do anything but set here and manage this job.

The water committee have not yet sold their bonds, and if they should fail to sell them, I would have not less than \$20,-

000.00 to pay for work performed this month. Now Mac., I am willing and ready to live up to my agreement in this contract, and you must do the same. I don't feel as if I was treated right in this matter; we went into this thing together; you agreed to put up your part of the money, and I agreed to put up my portion, and arranged for it. If you will put in \$8,000.00 cash, in addition to the plant furnished, I will try and carry the work along, but this amount I must have not later than the 5th, as I must use part of my money in other places by that time.

Please let me hear from you on receipt of this.

Yours truly,

LEE HOFFMAN."

- 4] Q. The witness is shown a letter, dated Portland, Oregon, September 11, 1893, addressed to J. McMullen, San Francisco, and signed Lee Hoffman, and is asked if the signature is the genuine signature of Lee Hoffman. A. Yes, sir.

Q. Was this letter received by you in due course of the mail, at San Francisco? A. It was.

(Counsel for defendant offers the letter referred to in evidence; objected to as immaterial; the same is received and filed, marked "Defendant's Exhibit 'Q2', G. A. B., Examiner.")

Q. The witness is shown a letter dated Portland, September 16th, 1893, addressed to J. McMullen, Esq., San Francisco, signed Lee Hoffman, and asked whether the signature is the genuine signature of Lee Hoffman.

A. Yes, sir.

Q. Was this letter received by you in due course of the mail, at San Francisco? A. It was.

(Counsel for defendant offers in evidence the letter referred to; same objection; the same is received and filed, marked "Defendant's Exhibit 'R.2.' G. A. B., Examiner.")

Thereupon the further examination of this witness is adjourned until 2 o'clock P. M., January 18th, 1896.

[Signed]

GEO. A. BRODIE, Examiner.

[295] Afternoon session, January 18th, 1896, 2 o'clock P. M. Present, the same parties as before.

JOHN McMULLEN resumes the stand.

Cross-Examination. Continued by Mr. R. Mallory.

Q. Yourself and Mr. Hoffman commenced figuring upon this work of building the waterworks from Bull Run to Portland several months before the contract was let, did you not?

(Same objection.)

A. We did.

Q. One of the principal considerations for your figuring together was that you did not either feel like handling so large a contract alone?

A. Well, I don't think that was the principal consideration; that undoubtedly was something of a consideration, but I think the principal consideration was that we considered that our chances of getting it together were better than the chance of either separately.

Q. You thought you would reduce competition by joining in your bid?

A. No, that is not the point; the point is that we would have the benefit of the judgment of each, and the ability, judgment and experience of each in securing the work and ascertaining the cost of it.

Q. But didn't you expect by combining your bids into one, you would to that extent cut off competition between yourself and Mr. Hoffman?

[296] A. That would be a natural result; when we agreed to go together, of course, we were not in competition.

Q. Wasn't one of the reasons assigned by you for wishing to take the contract with him, that you were a nonresident, and preferred to have somebody here to look after the business rather than look after it yourself?

A. I don't think I ever made such a statement to Mr. Hoffman; the fact is, that it was Mr. Hoffman that approached me to go in with us, or to go in with the San Francisco Bridge Company.

Q. There had been some effort in the direction of constructing the waterworks in this city prior to this time, had there not? A. There had.

Q. At that time the San Francisco Bridge Company was one of the bidders on the contract?

A. That is correct; it was the lowest bidder.

Q. The San Francisco Bridge Company was the lowest bidder?

A. Yes, sir.

Q. But the contract was not awarded at that time?

A. That is right, because they were unable to sell the bonds, I think.

Q. While you and Mr. Hoffman were figuring upon this work, you figured also upon the submerged pipe for taking the water across the Willamette river, did you not?

(Objected to as immaterial.)

A. We did

Q. And that was considered by you as belonging to the same transaction that you were concerned in?

(Same objection.)

97] A. That was one of the sections of the work advertised by the water committee at the time that we secured the contract for the manufacturing and laying of the pipe.

Q. You had figured together with a view of bidding together on that as well as the other?

A. We had.

Q. That was included as much as anything else between you in the partnership for all that was said between you on that subject, prior to the execution of the contract, Exhibit No. 1, was it not?

A. Whatever was done prior to the signing of the partnership agreement it was in the same condition as the job was secured; the submerged pipe in our negotiations with each other was in the same status as this relating to the pipe lines proper.

Q. It was a part of your understanding in your contract that you should take and share whatever other contracts might be let in connection with this water system, was it not?

A. That is correct, sir.

Q. As a matter of fact, you and Mr. Hoffman did not submit any bid for the submerged pipe, did you?

A. We did.

Q. Did you submit a bid together, you and Mr. Hoffman, for the submerged pipe?

A. Well, we were interested together in the bid that was submitted.

Q. Is it not a fact that Mr. Hoffman notified you that he would not have anything to do with the submerged pipe?

A. That was at the subsequent letting.

[298] Mr. MALLORY.—The subsequent letting is what I referred to.

(Counsel for complainant objects to the last interrogatory as well as all the preceding interrogatories upon the same subject matter, upon the ground that the same is immaterial.)

Q. Was a bid submitted by yourself and Mr. Hoffman for the submerged pipe work at the time you submitted your bids for the manufacturing and laying of the other pipe?

A. There was a bid submitted by Mr. Hoffman in which we were jointly interested.

Q. Mr. Hoffman submitted that bid, did he?

A. Well, I think the bid would be the best evidence of that; I don't know whether it was bid in his name or in the name of the San Francisco Bridge Company; that is the bid that we desired to take the work on.

Q. Was the submerged pipe a portion of this work?

A. What do you mean by "this work"?

Q. I mean of the water system bringing Bull Run water to Portland.

A. Yes, it was; that is, of the whole work, but not of the manufacturing and laying of the pipe.

Q. It was a part of the whole work—the whole system?

A. Yes, sir.

Q. Now did you, or Mr. Hoffman, or did both of you submit a bid for the submerged pipe portion of the work at the time the other bids were submitted for the manufacture and laying of the pipe?

A. We did.

[299] Q. Were any other bids submitted except yours?
(Objected to as immaterial.)

A. I think there were several; I think there were seven or eight bids submitted.

Q. Was not the work of manufacturing and laying the submerged pipe let as a result of those bids?

A. It was not.

Q. Was it or not afterwards offered and other bids received?

A. It was.

Q. At the second letting did yourself or Mr. Hoffman submit any bids?

(Same objection.)

A. I would have to look up the records; i could not tell you; I don't think that I was in Portland at the second letting. I think I furnished Mr. Hoffman what data and information I had relative to it, and I relied on him to put in a bid; that is my present opinion.

Q. Is it not a fact that Mr. Hoffman notified you that he would have nothing further to do with the work of manufacturing and laying the submerged pipe?

(Same objection.)

A. I don't think that is the fact.

Q. And didn't you, on your own account, without any reference to Hoffman, afterwards submit a bid for that work at the time of the second letting?

(Same objection.)

A. I cannot state without looking up the records about that. My present opinion is, though, that I did not, as I stated in answer to a former question.

Q. But the fact is, is it not, that Mr. Hoffman took active control of this whole business, and your portion of it, whatever you did, was simply advisory?

0] A. No, that is not correct.

Q. I mean so far as any work you did directly connected with the execution of the contract on the ground?

A. Well, when you limit it to on the ground, yes.

Q. The work you did consisted chiefly in procuring data, and advising ways and means for getting the contract in the first instance, and in advising and looking after matters in San Francisco and elsewhere, such as would need attention there, was it not?

A. That is substantially correct, with this addition, that I frequently came to Portland and conferred personally with Mr. Hoffman, and he frequently took me out on the work along the line, that I might make any suggestion that I deemed expedient.

Q. Mr. Hoffman notified you, did he not, that he had a large amount of money involved in the work, and wanted you to put in your share?

(Objected to by complainant as irrelevant and immaterial.)

A. Well, we differed—

Q. Just answer my question, please.

A. Well, perhaps that is correct; it ought to be qualified, but you don't seem to desire to have it qualified.

Q. You did not put in any money other than that you have already testified to—the plant that came from Seattle, some money for a hydraulic punch and shears and for some portable forges?

(Same objection.)

A. We also paid Mr. Clemens Hirshell's bill for his advice in connection with the contract.

Q. (Continued.) And the sum paid to Mr. Hirshell?

[301] A. Those are the principal items; there were some other small items—my personal traveling expenses when I came to Portland, telegram accounts, and matters of that kind.

Q. When Mr. Hoffman asked you to put up ten thousand dollars, about the 16th of September, 1893, you did not put up that sum of money, did you?

(Same objection.)

A. I did not.

Q. He then informed you that unless you put it up he would not further recognize you as a partner in that contract, did he not?

(Same objection.)

A. Well, not exactly in that language, no, sir.

Q. Well, if he did not in that language, did not he so notify you in effect?

(Same objection.)

A. I think that is correct.

Q. He did not after that, did he, allow you any access to the books or consult with you further about it?

A. He did consult with me after that, yes, sir.

Q. When?

A. At the time that the contract was let for the distributing system in the city; the date of that letting, I think, was in September; I was here for several days at that time, and we had a general talk; he did not, at that time, on that occasion, deny my interest in the premises; he felt very cheerful and happy then, because he had received enough money from the city to reimburse him for all that he had invested in it, and to carry the job on, and pay all its liabilities, and have a surplus of

302] some ten to eleven thousand dollars to the credit of the firm on the books.

Q. You are answering more than I asked for, Mr. McMullen. I simply asked you when it was you had this conversation?

A. I cannot give you the date of that conversation, but I can establish it later.

Q. These conversations that you had with him were all here in Portland? A. Yes.

Q. Who was present?

A. I don't think anybody was present when we talked our private business over; we had several talks.

Q. Is it not a fact, Mr. McMullen, that after your failure to put up ten thousand dollars, as he requested you to do in his letters to you of September 11th and 16th, that he refused thereafter to recognize you as a partner in this business?

A. That is not true.

Q. I will ask you if later than that, sometime in December of that year, or the year 1894, I don't remember which—

The WITNESS.—It was December, 1893.

Q. (Continued.) You did not apply to him for access to the books, and if he did not refuse to give it to you, and deny your interest in it altogether?

A. He refused to let me see the books, but he did not deny my partnership interest.

Q. He refused to give you any information?

A. He refused to give me access to the books.

Q. You say that he acknowledged your rights as a partner, but refused to allow you to see the books, is that what you say?

303] A. That is what I say, exactly, coupled with that a demand that I should name a price for which I should sell out my interest in the contract, which I declined to unless I could see the books first.

Q. Your correspondence with him concerning this business ended about the 20th of September, did it not?

A. It did.

Q. The frequent letters that had been passing between you prior to that date, concerning the business and the conduct of it ceased after that; is that correct?

A. That is correct, sir.

Q. He conducted the business without advising you, and without your advice to him from that time forward?

(Objected to as immaterial.)

A. That is substantially true, with the exception of the time that I was in Portland.

Q. And that was the time that you talked to him about the distributing system?

A. No, I simply referred to the distributive pipes in Portland to fix the time that he last conferred with me relative to our contract on the pipe lines, and prior to the conference of December 4th.

Q. What is the nearest date that you can fix as to the time when that occurred?

A. I think it was in September; may have been October, but I can get the date to-morrow, I think.

Q. Whatever interest Mr. Hoffman recognized you as entitled to in this contract referred to what had occurred prior to the 16th of September, did it not?

[304] (Objected to as incompetent and immaterial.)

A. Is that the way you want the question, judge? I don't quite apprehend it.

Q. Well, I will make it so you can understand it. You say Mr. Hoffman, in the conversation you had with him after the 16th of September, and either some time in the month of September or in October, Mr. Hoffman did not deny your interest in the contract; did he not refer to such interest as might have accrued to you prior to the 16th of September?

(Same objection.)

A. I don't know.

Q. Did he not state to you at that time that whatever interest had accrued to you in that contract prior to what he claimed was its dissolution he would be willing to pay you what was fair compensation?

A. He never did.

Q. And was not that what he referred to when he proposed to buy you out?

(Objected to as immaterial.)

A. I did not understand that he had any such thought in his mind.

Q. Did he not tell you at that time in this conversation that you had entirely failed to come up to your part of the contract?

A. He did not.

Q. (Continued.) And to put up the money as you had agreed to?

A. He did not.

Q. He made no reference to those things?

(Objected to as immaterial.)

A. He did not.

[305] Q. When you and Mr. Hoffman were figuring upon the bid that you finally put into the water committee, you also figured upon the bid that you were to submit in the name of the San Francisco Bridge Company, did you not?

A. We did not.

Q. Did not? A. No.

Q. You had no figuring with him or understanding with him about the bid that the San Francisco Bridge Company was to put in, did you?

A. I did not, none at all; the only bid that we agreed to was the bid that went in in Mr. Hoffman's name.

Q. He did not know that you were going to put a bid in for the San Francisco Bridge Company, did he?

A. Oh, yes.

Q. How did he find that out?

A. Well, I think I told him so; I told him that I did not want to come up here and go home again without putting in a bid, and, for appearance sake, I wanted to put in a bid.

Q. Did you show him the bid?

A. I don't think so.

Q. Do you swear that you did not?

A. Yes, I swear that I did not.

Q. You swear that you did not? A. Yes.

Q. Mr. McMullen, is it not a fact that you arranged that bid with Mr. Hoffman purposely, so that it should overbid the amount of the other bid that you and he had.

A. The fact is—

Q. Just answer that question. -A. No, sir.

[306] Mr. COX.—You can now make what explanation you want to.

The WITNESS.—The explanation is this; There was only one bid agreed upon between Mr. Hoffman and myself, and that was the bid in which we both were interested in, and which was put in in the name of Hoffman & Bates; the other bid referred to by Mr. Mallory is the bid put in by the San Francisco Bridge Company, some forty or fifty thousand dollars higher than the bid that we proposed to take the job on, and was put in simply to keep the San Francisco Bridge Company's name before the public, and for the further purpose that all the contractors knew that the San Francisco Bridge Company was here, and would think it strange if we did not put in a bid. Mr. Hoffman did not care anything about the bid, nor did the San Francisco Bridge Company care anything about it, but it was put in as a pure matter of form. We knew it would be too high, and that is absolutely the truth about that bid as I know it to be.

Q. Is it not a fact that you and Mr. Hoffman agreed together to make the aggregate of the bid of the San Francisco Bridge Company more than the aggregate of the bid of Hoffman & Bates?

A. No, sir, Mr. Hoffman had nothing to do with the San Francisco Bridge Company's bid, and it was put in by the San Francisco Bridge Company for the purpose as I have stated, and Mr. Hoffman cared, or knew, or had nothing to say, about it.

Q. Is it not also a fact that the bid of Hoffman & Bates for the manufacturing and laying of the pipe was \$465,667.00, is it not?

A. I think that is correct, sir.

[307] Q. They also put in a bid for the steel plates for the pipes, and that bid was \$359,278.80, was it not?

A. I don't know, sir.

Q. And for bridges there was bid \$33,562.94; do you know about that?

A. I don't know, sir.

Q. Is that correct?

A. I don't know; I think that could be better proved by the books of the water committee.

Q. The head works was \$17,080.00, is that correct?

A. I cannot remember about those.

Q. The San Francisco Bridge Company submitted a bid for the manufacture and laying of the pipes for \$514,664.00, wasn't it?

A. I don't know; I presume that is correct, though.

Q. And for steel plates for pipes, \$348,781.00?

A. I don't know; I presume that is the sum.

Q. And for bridges, \$31,297.07?

(Counsel for complainant objects to all of this evidence, on the ground that it is incompetent.)

A. I don't know.

Q. For head works, \$16,550.00?

(Same objection.)

A. I don't know.

Q. Was not the understanding between you and Mr. Hoffman, that while your bid for manufacturing and laying pipe was \$514,664.00 and the bid of Hoffman & Bates was \$456,656.00, you made the bid of the San Francisco Bridge Company on all of the other work less than the amount named in the bid of Hoffman & Bates?

[308] A. The low bid of either Hoffman or the San Francisco Bridge Company was the joint bid in all cases, and other bids that may have been put in by either parties, as I said before, we had no interest in; it was simply put in to let other people know that both parties were represented here, as the water committee and the engineers and contractors all knew that both parties were represented here. The higher bid was simply put in to let the name of that firm appear as a bidder, and we had no interest in it, and we did not care anything about how much it was, and by "we" I mean Mr. Hoffman and myself. The high bid was put in simply to allow the firm putting it in to be represented at the bidding.

Q. Now, was it not agreed and understood between yourself and Mr. Hoffman that, if when these bids should be opened, Hoffman & Bates should get the contract for manufacturing and laying the pipe, and the bid of the San Francisco Bridge Company should be the next lowest on the other items, and the bid of Hoffman & Bates should be the next lowest to them, or above them—that in that case, the San Francisco Bridge Company would refuse to accept the award to them, if it were made to them, and all effort should be made that

could be made to induce the water committee to take the contract at the rate named in the bid of Hoffman & Bates?

A. That is absolutely untrue; it is more than that, it is idiotic; these bids were accompanied by a check, I think, to the amount of \$25,000.00, to carry out the contract, and we would have to sacrifice that check to get the price of about—according to the items in the question—\$14,000.

Q. I simply ask the fact whether there was not such arrangement as that?

[309] A. No, sir, there was no such arrangement; I don't think that anybody ever told you that there was ever any such arrangement.

Q. I don't think, Mr. McMullen, that there is any question of veracity between you and I; I am not arguing the question.

A. There was no such arrangement.

Q. As a matter of fact, there was no award made to the San Francisco Bridge Company upon the bid they put in, was there?

A. No, sir.

Q. It is a fact, Mr. McMullen, is it not, that Mr. Hoffman knew, when he put in this bid in the name of Hoffman & Bates that you were to put in one in the name of the San Francisco Bridge Company, and that the bid that you were to put in would not be a competing bid to the one which you and he had agreed upon?

A. I think that is correct.

Redirect-Examination.

Questions by Mr. L. B. COX:

Counsel for complainant wishes it to be understood that all interrogatories addressed to this witness or other witnesses relative to matters which transpired prior to the execution of "Complainant's Exhibit No. 1" are contingent upon the Court's ruling when the cause shall be reported from the examiner, as to the materiality of such testimony offered by the defendant.)

Q. Mr. McMullen, when did the matter of joint action between yourself and Mr. Hoffman in regard to the waterworks of the city of Portland under consideration first come up?

[310] A. It first came up several years before this job was awarded when the bids for building the Bull Run pipe line were taken, I think, in 1887, after we were the lowest bidder. At

that letting Mr. Hoffman came to me and congratulated me, and said that we made a bold, good bid, and that he did not think we knew so much about pipe lines, and said that he was sorry that it was not going to go through; I think it was Governor Pennoyer that vetoed the bonds; he said, "When this thing comes up again, Mac, we must go in together, and see if we can't get it," and we frequently talked during the time that intervened between that occasion and December, 1892, when again negotiations were actively commenced, and it was understood the water committee were going to let the contract early in the spring.

Q. Now, what do I understand from answers you have given to cross-interrogatories as to the amount of money which Hoffman was estimating as the basis of his bid at the time you were brought into contact with him when you came to Portland, about the 1st of March, 1893—I mean the bid for manufacturing and laying of steel pipe; was it greater or less than the amount of the bid which afterwards put in in the name of Hoffman & Bates?

A. When we came together to compare items in the estimate, he was generally higher than we were.

Q. How was the bid which was finally put in in comparison with the figures that you found Mr. Hoffman had under consideration when you and he were first brought into contact on this occasion?

A. I think it was perhaps \$20,000.00 lower.

Q. Which was lower?

A. I think the bid which was finally put in was lower than the estimate that he favored.

Q. At whose instance was the reduction made?

A. It was made at my instance.

Q. In what shape were the figures which you brought from San Francisco with you at the time you arrived in Portland?

A. Well, the figures showed the quantities and showed the prices that we had got on the different items from the east—from our representative in the east—and also showed the prices that we put formally on the same work several years before, and I brought all the correspondence that we had up to that date, and out of the correspondence we took the items and tabulated them.

Q. What I mean is, were they of such a definite character that you could have acted upon them in preparing bids or submitting bids?

A. No, they were not; they were constantly being changed; we were daily receiving additional advices both from the east and from San Francisco.

Q. Explain what changes were necessitated by these advices of which you spoke.

A. Well, sometimes it raised the items under consideration, and sometimes it lowered them.

Q. What was the character of the advices; how would the advices you got apply to the matters you had under consideration?

A. Well, we were estimating, for instance, the cost of the plant to punch and rivet the iron for this pipe line, and the estimate that we had on this machinery when I came to Portland was an estimate that we had got from machine-shops in [312] San Francisco, and perhaps from some other place, but when I got to Portland I got other advices from our New York office that were much more favorable as to cost of machines to do the riveting and punching, and rolling and bending for doing that work. In other words, the prices that we had when I came to Portland on the different items were largely our own judgment, and such information as we had been able to get in San Francisco, while the prices that we had just prior to putting in this bid were obtained from information gotten in San Francisco, and additional information telegraphed us, or written us by the New York office.

Q. Do you remember how many bids, all told, there were upon this portion of the work?

(Objected to as immaterial.)

A. I think there were seven or eight.

Q. You stated in your direct examination, in answer to an interrogatory in explanation of the action between Mr. Hoffman and yourself that there was no definite, final estimate arrived at, except the one that was put in the bid, but other estimates were made jointly, and when you came to Portland you brought all the data and so forth, that you had, and Hoffman produced all that he had—do you mean to say that this estimate had been made jointly or separately?

A. I mean that the estimate that was subsequently embodied in the bid was made jointly; that is, we both assented that we would agree to take the job for that amount of money.

Q. But you had, you and Hoffman had, made an estimate upon the matter separately? A. Yes, sir.

[313] Q. Had figured on it?

A. Yes, had figured on it separately, that is, separately in the sense that he was getting information and using his judgment, and I was getting information and using my judgment, and when I got to Portland, we throwed our joint information and judgment into one final estimate to win the job on.

Q. I will ask you some questions in regard to what took place after Mr. Hoffman and yourself had executed the contract, "Complainant's Exhibit No. 1"; you have been asked something about the presenting of a bill from Hoffman to the San Francisco Bridge Company, I think, for the plant; I don't mean to say a bill, but a check sent by Hoffman to the San Francisco Bridge Company, I think for a plant which was sent down from Seattle, and was owned by the San Francisco Bridge Company. I will ask you to state at the time this check was sent in, if you know, was it prior to or subsequent to the 20th day of September, 1893?

A. It was long after that; I think it was in January, 1894.

Q. I will ask you to state whether or not you ever gave any different answer to the proposition made by Mr. Hoffman in his letter, "Defendant's Exhibit R2," where he notified you that if you did not put up \$10,000.00 by the 20th of September, he would not longer consider you a partner in the contract, except the answer you gave in your letter, "Defendant's Exhibit No. Y." dated September 18th?

A. That was the only answer I ever gave him.

[314] Q. I would ask you to state if you ever agreed with Mr. Hoffman at any time that the partnership between you and himself should be determined as of that date?

A. Never did; I never proposed that it should be other than in that letter.

Q. You have stated something about having conversations with Hoffman in September, 1893; I understood you to say, when, in connection with the matter of distributing the water in the city of Portland, the work of manufacturing and laying

the steel pipe was also discussed between you; was that in 1893 or 1894?

A. That was in 1893; that was the first time I saw him after he wrote the letter of the 16th of September.

Q. Then you stated that in December—

The WITNESS.—That was the second time that I saw him after he wrote that letter.

Q. (Continued.) Then you stated that in December you made a demand on him for an inspection of the books, and a statement as to the condition of the work?

A. That is correct, sir.

Q. Was that in 1893 or 1894? A. That was in 1894.

Q. And you may state succinctly what his response was.

A. It was substantially that he wanted to know what I would take for my interest in the contract, and I told him that it was an absurd proposition to put to me without submitting the books for an examination, and he at first did not absolutely refuse to let me see the books, but he led up to that; he stated finally that I could not see the books, that I might come and make a proposition as to what I would take for my interest—what I would sell out for. I told him point blank that I would not make any such proposition.

Q. You may explain fully just what you did do in connection with the procuring of this contract, and its execution, being as concise and collective as possible.

A. Well, we started in to find out the cost of the job, and we started in with all our ability and resources to estimate with our engineering staff, which consisted of Mr. George W. Catt, who is in charge of our office in New York, and who is a civil engineer by profession, and an experienced contractor, and also Mr. Herman Krusi, our assistant engineer and Mr. H. S. Wood, also a civil engineer, and we proceeded to estimate this job, and to gather data in the east as to the cost of other or kindred or similar jobs, one at Rochester, New York, and one in Jersey City, New Jersey.

Q. How much time was given by these gentlemen to this work, approximately?

A. All the time from early in January, 1893, to the letting of the contract, and after the letting of the contract a very large portion of their time, and my own time, until the job was well under way, at the end of July or 1st of August, 1894.

Q. Who paid these gentlemen during the time you were engaged in this work, and what were the salaries they were drawing?

(Objected to as immaterial.)

A. The San Francisco Bridge Company paid their salaries; Mr. George W. Catt was paid a salary of \$5,000 a year; and Mr. Herman Krusi was paid a salary of \$3,600.00 a year, and Mr. [6] H. S. Wood was paid a salary of \$2,100.00 a year, and my own salary was \$5,000.00 a year.

(Counsel for defendant objects to this testimony as immaterial.)

Q. How much time did these gentlemen bestow on this work at your instance, or that of the San Francisco Bridge Company, if any, after the contract had been awarded, and the execution of the work was entered upon?

(Same objection.)

A. Well, as I said before, the greater portion of their time from the date of the award to the end of August, that would be a period of about five months.

Q. How much of your own time, between the letting of the contract and the 20th of September, 1893, was devoted to the work?

(Objected to as immaterial.)

A. A large portion of my time, I cannot say exactly, but looking back over the correspondence, I find that there was almost daily something to be done in connection with this job.

Q. Have you any means of knowing whether Mr. Hoffman's time was exclusively given to this work while it was being performed or was it divided between this and other pursuits?

(Same objection.)

A. It was divided between this contract and attending to his own private contracts and business, and the administration of his own private affairs and property, which might have taken considerable of his time; he also, to my knowledge, during the pendency of this contract, went abroad to the Sandwich Islands on a pleasure trip, and he also went east with his family to the World's Columbian Exposition in Chicago in 1893, and he made a trip to Yellowstone Park; exactly what proportion of this time was devoted to this contract and what proportion was devoted to his own private contracting busi-

ness or affairs I am not advised. I know that his engineer, Mr. Bush, attended several lettings, one in particular in Tacoma, I remember, and also sent bids to California upon bridge work that was let there; but what contracts he secured, or what he did, I am not fully advised; I know that he did not abandon his own established business.

Recross-Examination.

Questions by Mr. R. MALLORY.

Q. When you came here from San Francisco to bid on the work of bringing Bull Run water to Portland, you brought with you all the data and figures that had been the basis of your bid several years before when you were the lowest bidder? A. I think I did.

Q. You had enough information then for the bid that you then put in to enable you to make the lowest bid for the work at that time?

A. Our bid at that time was the lowest bid, and we had all the data from which that bid was made, but whether I brought it to Portland with me or not I am not sure, but I rather think I did.

Q. But while you were figuring on this matter and hunting up data in San Francisco, and Mr. Hoffman was figuring and [318] hunting up data up here, you had all that data in your possession there? A. I think so; yes, sir.

Q. And from what data you had there, including that upon which that bid was based, did you not reach the conclusion in a general way as to the amount of the bid that you should put in here? A. No, I did not.

Q. You had no such conclusion?

A. I do not think I knew within a hundred thousand dollars of what bid we should put in.

Q. You swear that you did not have a bid prepared in general from aggregating about the amount you would bid when you arrived here?

A. No, sir, I did not. We had a great many tabulated statements of this work, some made by Mr. Krusi, some made by Mr. Wood, some made by Mr. Catt of New York.

Q. From all this data that you had, you had not prepared a bid in substance what you could afford to do the work for when you arrived here?

A. I had not, and it must be apparent that I had not.

Q. Had Mr. Hoffman prepared any bid in a general way indicating the amount which he proposed to offer to do the work for, on your arrival here from San Francisco?

A. No, sir, he had not. You said a bid; now you are confounding a bid with an estimate. Mr. Hoffman had tabulated estimates of quantities and prices.

Q. Well, had he not tabulated estimates of prices for which he was willing to offer to do this work at the time you arrived here from San Francisco?

A. No, sir; I think he was waiting for me to get here with my estimate of prices.

[19] Q. Had you not similar tabulated estimates which you brought with you from San Francisco for which you proposed to offer to do the work? A. No, sir.

Q. Is it not a fact that the estimates that you had prepared and for which you proposed to do the work was many thousand dollars less in amount than that prepared by Mr. Hoffman for the same work?

A. I never had any such bid prepared. The only bid that I ever prepared or ever assented to or ever contemplated putting in was the bid put in by Hoffman & Bates, and Mr. Hoffman assented to it.

Q. When he finally agreed upon a bid, you and Mr. Hoffman, was that more or less in amount than the aggregate amount of your estimates that you brought with you from San Francisco upon which you proposed to bid?

A. I did not bring any such estimates from San Francisco. I did not have any complete estimate until I got here, until we made it up jointly.

Q. Was the bid which you finally submitted for the San Francisco Bridge Company more or less in amount than the aggregate amount of the estimate which you brought with you from San Francisco, and upon which you proposed to base your bid for this work?

A. I did not bring any estimate with me from San Francisco upon which I proposed to base my bid for this work.

Q. After you had seen the estimates of Mr. Hoffman and

had compared or examined them, what recommendation did you make as to the amount of his proposed bid being reduced or increased?

[320] A. After we had been in consultation several days figuring and estimating we arrived at an estimate for a bid, and the estimate was approximately \$20,000.00 higher than the bid which we subsequently put in in the name of Hoffman and Bates, and that estimate was reduced solely at my instigation to the price which we finally did put in to the bid, and I obtained Mr. Hoffman's reluctant consent to such reduction.

Q. Yet the San Francisco Bridge Company made a bid for the same work some \$20,000.00 higher.

A. Nearer \$50,000.00.

Q. Nearly \$50,000.00 higher than the bid which was put in in the name of Hoffman & Bates, and this bid was put in by yourself for the San Francisco Bridge Company?

A. I have explained that bid; the San Francisco Bridge Company simply put in a bid for the appearance of the thing, as I was here, and the company was represented here.

Q. It was put in with Mr. Hoffman's notice and knowledge?

A. It was put in simply to keep the company before the public, as we were known to have figured on it; it did not represent anything; it was simply put in to have it high enough that it would not receive any consideration.

Q. Put in just simply that the water committee know that the San Francisco Bridge Company was a bidder?

A. Judge, I have explained that five times.

Q. Was your purpose to let the water committee know that the San Francisco Bridge Company was a bidder?

[321] A. It did not have any purpose other than the purpose which I have already indicated.

Q. Now, Mr. McMullen, you say that Mr. Catt put in nearly all his time from the 1st of January?

A. I stated early in January.

Q. From early in January for about five months afterward in connection with this business?

A. I did not say nearly all his time; I said a good portion of his time.

Q. Well, a good portion of his time?

A. That is correct.

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Q. His salary was \$5,000.00 a year?

A. That is correct.

Q. Did you ever say anything to Mr. Hoffman or give him to understand that you expected to charge the Hoffman & Bates Company here for the services of Mr. Catt?

A. I never did, sir; I considered it as my contribution to this enterprise.

Q. Mr. Krusi was getting a salary of \$3,600.00 a year; did Mr. Hoffman & Bates or Mr. Hoffman, understand that you expected to charge for his services?

A. I did not give Mr. Hoffman such an understanding nor did I charge for his services; I simply put it in as our contribution to this joint venture.

Q. Mr. Wood received a salary of \$2,100.00 a year; did you ever suggest to Mr. Hoffman that you were employing him at the expense of Hoffman & Bates and that his expenses were to be charged to this work?

A. Well, as to Mr. Wood; I offered Mr. Hoffman after we got the job Mr. Wood's assistance in the administration of the job, and he finally decided not to avail himself of his services.

Q. You are not answering my question at all.

A. No, sir, I did not then, and I do not now, unless the partnership is settled on the basis that each of the partners is to be paid for the time he contributed to it.

Q. Did you in any of the correspondence you had with Mr. Hoffman or in any conversation you had with him, tell him as a reason why you did not put up the money that he asked for that you had contributed the services of these men, and that should stand as your part of this work?

A. I never did.

Q. You never mentioned these circumstances to Mr. Hoffman in his lifetime at all, have you?

A. Mr. Hoffman was well aware—

Q. Just answer my question.

A. It was not necessary to mention that; he knew all about that.

Q. Just answer the question whether you ever have or not?

A. I never did.

Q. Did you ever mention to Mr. Hoffman in his lifetime that you expected to charge for your own services?

A. I never did.

Q. And that your services would be charged up as an item of expense against this Hoffman & Bates contract?

A. I did not, sir. I contributed that as a part of my contribution towards this joint enterprise, and I expect to be paid out of the profits, if there are any.

Q. Do you mean to have it understood from your testimony that Mr. Hoffman did not substantially devote his whole time, so far as was necessary, for the purpose of this work?

A. I mean to have it understood exactly as I said it.

[323] Q. Do you know at what time he went to the Sandwich Islands?

A. He went during the pendency of this work.

Q. You mean by pendency of this work, before the payments were finally made?

A. Before the job had finally been accepted.

Q. Before the pipe had all been laid?

A. I think it was after January, 1895.

Q. You know, do you not, Mr. McMullen, that if Mr. Hoffman went aboard, it was after the pipe had been laid?

A. During the period we were under contract to maintain it.

Q. It was during the period you were under contract to maintain it.

A. Yes, I think that is it.

Q. You know that same thing is true as to his having gone to the Columbian Exposition?

A. No.

Q. And is not that true as to the time he went to the Yellowstone Park?

A. I am not advised as to the date he went to Yellowstone Park, but the Chicago Exposition was held in the summer of 1893, and that was a busy time on this job.

Witness excused.

(Signed) J. McMULLEN.

Thereupon the further taking of the testimony herein is adjourned until January 15th, 1896, at ten o'clock A. M.

(Signed) GEO. A. BRODIE,
Examiner.

24] Office of G. A. Brodie, U. S. Examiner, Portland, Oregon.

January 15th, 1896, ten o'clock A. M.

At this time, pursuant to adjournment, come the parties herein, the complainant appearing by Mr. L. B. Cox, of counsel, and the defendant appearing by Mr. Rufus Mallory, of counsel, and thereupon the following proceedings were had, to-wit:

ISAAC W. SMITH is called as a witness for the complainant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q What is your occupation, Colonel?

A. Civil engineer.

Q. What connection, if any, have you with the water committee of the city of Portland?

A. I am chief engineer of the water committee and superintendent—chief engineer of construction superintendent of operation.

Q. How long have you held that position?

A. I have held that position since 1886—February, 1886.

Q. You may state whether or not the work which was done by Lee Hoffman in the name of Hoffman & Bates in the matter of bringing Bull Run water to the city of Portland for the water committee was done under your supervision.

25] A. It was done under my supervision from beginning to end.

Q. You, of course, are familiar with the original contract that was entered into by the water committee and Lee Hoffman, under the name of Hoffman & Bates, which has been offered in evidence here as "Complainant's Exhibit No. '2' "?

A. Yes, I am.

Q. I would ask you to, state what, if any, modifications were made in that contract after its execution; you may describe generally if there were any, and in what they consisted.

A. Well, as to modifications, there were no changes in the contract at all; the modifications were of this kind: in the prosecution of the work conditions arose which were not con-

templated before, entailing extra expenses on the contractors, and those bills were allowed; that was all the modifications there were.

Q. You may state whether you have in your possession any notes or other data which would serve to determine those allowances.

A. I have all of the accounts in my possession; I made up all the estimates; all the bills passed under my hands for the water committee, every dollar that went to Hoffman & Bates.

(Witness is here shown "Complainant's Exhibit No. 4.")

Q. You may state whether or not there are any items in your office in addition to the items which appear in this exhibit which serve to show allowances made or claimed by Lee Hoffman for extra work of the character you have just described.

A. There is the final estimate amounting to \$458,000.00 [326] that I sent to the water committee; that was made up by me, and I have a copy of it in the office; then there is what is called extra work, but is not extra work in the proper sense; it is extra expense; extra work is defined in a contract as work that is outside of the contract, but this was not extra work; it was extra expense—mere modifications, they might be called.

Q. Using that term, then, "extra expense," I want to know have you any account in addition to the items that appear in this exhibit?

A. Nothing in addition; all that is passed through my hands and they are absolutely as they are in my books; this is the amount paid (referring to exhibit).

Q. I am talking about matters paid or unpaid.

A. I have in my possession bills sent me by Hoffman & Bates, dated February 5, 1895; the bills are here; these are the bills (showing). This is an abstract of the bills amounting to \$19,412.73; this one is March 9th, and this one is April 6th; there was subsequently allowed a credit which reduced the amount to \$9,224.68; that is the final claim of Hoffman & Bates—the last that they have made.

Q. That, as I understand, is the claim which they have made in addition to the amounts specified in Exhibit No. 4, which have been paid? A. Yes, sir.

Q. I will ask you to state if you have had any copy made of the statement you have in your hand.

A. I have, yes. (Witness produced a copy.) These are copies of the bills.

Q. Were those prepared under your direction?

A. Under my direction.

[327] (Counsel for complainant offers in evidence the documents produced by the witness, and it is agreed between counsel that the papers produced by the witness are copies of the original documents in his possession as engineer and superintendent of the water committee, one statement being dated February 6, 1895, showing accounts aggregating \$19,412.73, which is received and filed, marked "Complainant's Exhibit No. 5." One statement dated March 9, 1895, carrying forward this credit, with divers charges and credits, showing a balance of \$19,252.18, which document is received and filed, marked "Complainant's Exhibit No. 6." One statement, dated April 1, 1895, carrying forward his last balance with a credit of \$27.50, showing a net balance of \$19,224.68, which statement is received and filed, marked "Complainant's Exhibit No. 7.")

Q. I will ask you to state what, if any, action the water committee has taken in regard to the claim made by Hoffman as represented in the exhibit just offered in evidence.

A. This is the action of the water committee; I have a copy of a letter which I wrote Hoffman & Bates stating the action of the water committee.

Q. What I want to get at is whether the water committee have allowed these amounts.

A. I stated the balance as per my statement, \$19,224.68; total amount allowed by the water committee was \$2,263.43, and the total rejected \$16,961.25.

Q. The allowance was \$2,263.43 out of a claim of \$19,224.68 and rejected \$16,961.25?

A. Yes, sir.

Q. You may state whether or not that is the way the matter stands at the present time.

[328] A. That is the way the matter stands at the present time.

Q. Then, do I understand that the amount owing from the water committee to Hoffman on account of this contract is the ten per cent reserve on the amount of the principal contract, together with \$2,263.43?

A. Yes.

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. Do I understand you that \$2,263.43 has been paid, or has not been paid? A. Has not been paid.

Q. There has been no settlement reached between the water committee and Hoffman & Bates as to this claim?

A. No settlement yet.

Q. There remains unsettled between the committee and Hoffman & Bates the amount of \$16,961.25 claimed by Mr. Hoffman as due to him?

A. Yes, claimed by Mr. Hoffman as due him.

Q. The 10 per cent reserve according to the contract still remains in the hands of the water committee?

A. Yes, sir.

Q. The 10 per cent reserve itself does not include the 10 per cent upon \$2,263.43?

A. No, it does not include the ten per cent on the extra compensation; only 10 per cent on the estimate that I made on the regular contract.

Q. I understand, then, that you claim that the work which Hoffman claims to have been extra work was not extra work at all?

[829] A. It was a modification of the contract—not extra work; the work states specifically the difference between modifications and extra work.

Redirect-Examination.

Questions by Mr. L. B. COX:

Q. I will ask you to state whether or not this amount of \$2,263.43 which has been allowed by the water committee was for work done in connection with bringing Bull Run water to Portland? A. It was.

Witness excused.

ISAAC W. SMITH is recalled as a witness for the defendant, by consent of counsel.

Direct Examination.

Questions by Mr. R. MALLORY:

Q. Mr. Smith, what had you, if anything, to do with the letting of bids for building the waterworks from Bull Run to Portland?

(Counsel for complainant objects to the question, and by agreement of counsel now enters a general objection to all evidence to be introduced on behalf of the defendant as to any matters which transpired in connection with the work under [330] consideration prior to the execution of "Complainant's Exhibit No. 1," on the ground that the same are immaterial.)

A. I prepared the specifications and advertised in the paper that bids would be taken on a certain day; prepared the blank form for the bid on which each person was to make his bid, by order of the water committee, of course.

Q. What, if anything, did you do with the bids when they were received?

A. The bids were referred to me by the water committee for tabulation and report. I tabulated the bids, giving the amount of each bid that each party submitted.

Q. By whom was the bids opened and to whom were they addressed?

A. The bids were opened in the presence of the water committee; the bids were opened by one of the members of the water committee or the clerk—I don't know which—and read.

Q. I will ask you if you prepared a tabulated statement of the bids. A. I did.

Q. Have you that statement here, or a copy of it?

A. I have a printed copy of the tabulation.

Q. Will you produce it, please?

A. This is the tabulation for the manufacture and laying. (Witness produces printed document.) I have the bids themselves.

Q. You have the bids themselves?

A. Yes, I have the bids here.

Q. I will ask you to state whether a bid was submitted by Hoffman & Bates, and if you have the bid with you.

A. Yes, I have the bid with me.

Q. Will you produce that bid, please?

[331] A. These are the bids; they are all here. Here is the bid of Hoffman & Bates (showing).

(Witness produces a paper dated Portland, Oregon, March 1, 1893, addressed to Frank T. Dodge, clerk of the water committee of the city of Portland, and signed Hoffman & Bates, by Lee Hoffman.)

Q. I will ask you to state whether or not this bid was sub-

mitted by Hoffman & Bates to do the work described in this paper? A. It was.

(Counsel for defendant offers in evidence the paper produced by the witness; counsel for complainant objects to the introduction of the same in evidence as well, as to all other exhibits relating to anything which may have transpired prior to the execution of "Complainant's Exhibit No. 1," on the ground as above stated to the interrogatories which were or which may be propounded to the witness relating to the same time, and by consent of counsel for defendant a general objection is allowed to be taken to all such evidence; the document referred to is received and filed, marked "Defendant's Exhibit 'S2,'" G. A. B., Ex., and by agreement of counsel it is stipulated that a copy thereof may be made by the examiner and substituted in lieu of the original.)

Q. I will ask you whether or not any certified check accompanied this bid of Hoffman & Bates.

A. There was. It is stated in the bid what the amount of it was.

Q. I will ask you if the check referred to here was furnished at the time the bid was filed.

A. It was furnished with that bid as he states.

[332] Q. I call the attention of the witness to a paper dated San Francisco, California, March 1, 1893, addressed to Frank T. Dodge, clerk of the water committee of the city of Portland, Oregon, and signed San Francisco Bridge Company, by John McMullen, President, and I will ask you to state what that paper is.

A. That is the bid of the San Francisco Bridge Company for performing the same work that Mr. Hoffman proposed to perform.

Q. It is a bid for the work described in the paper itself?

A. Yes, in the paper itself—the same work and the same items in both papers.

(Counsel for defendant offers in evidence the paper last shown the witness; same objection; paper referred to is received and filed, marked "Defendant's Exhibit T2"; same stipulation as to copy to be substituted in lieu of the original.)

Q. This paper refers to a certified check for \$27,300.00. I will ask you to state whether such a check accompanied this bid.

A. It did accompany the bid.

Q. I will ask you to state whether these bids were opened at the same time at the same meeting of the committee.

A. They were all opened at the same time—same day.

Q. To whom was the bid finally awarded?

A. The bid was awarded to Hoffman & Bates.

Q. I will ask you to state whether this same work for building the system of waterworks from Bull Run to Portland was offered at any time prior to this letting on the 1st of March?

(Same objection, and as immaterial and irrelevant.)

333] A. Not the same work; the construction of work from Bull Run to Portland was offered and the bids were taken, but it was not the same work; it was for bringing Bull Run water to Portland, but it was for much less quantity of water. Six million gallons a day was only estimated to bring in then, a much smaller quantity than now.

Q. I will ask you whether the San Francisco Bridge Company was a bidder upon that work.

(Same objection.)

A. I am not positive whether it was the San Francisco Bridge Company or Mr. McMullen himself, but it was one or the other.

Q. Either the San Francisco Bridge Company or Mr. McMullen? A. Yes, sir.

Q. Were there other bids for that work besides Mr. McMullen or the San Francisco Bridge Company?

A. Yes, sir.

Q. Do you remember, and can you state now, who was the lowest bidder for that work?

A. I think Mr. McMullen was the lowest bidder; there were several works—making of roads, etc.—but on the principal item my recollection is that Mr. McMullen was the lowest bidder.

Q. The contract was not awarded, was it?

A. The contract was not awarded.

Q. The city did not succeed in selling its bonds?

A. No, sir; they could not sell the bonds; the governor vetoed the bill for selling bonds.

Q. The bids of Hoffman & Bates and the San Francisco Bridge Company, by John McMullen, to which your attention has been called, did they or not include the pipe from Mt. Tabor

to Portland, and the submerged pipe across the Willamette River?

[334] A. They did not in that bid for manufacturing and laying.

Q. They were not included in that bid?

A. No.

Q. I will ask you if the work of manufacturing and laying the submerged pipe was offered in a separate bid.

(Objected to on the ground that it is immaterial and irrelevant.)

A. The work of manufacture and laying was a separate bid, and did not include anything except manufacture and laying.

Q. What was the bid, if any, with regard to bringing water across the Willamette River; what was the nature of that bid?

(Same objection.)

A. Well, we had separate bids for the submerged pipe; they were opened on the same day, and that was a separate bid from the other; these bids I have here.

Q. I will ask you to state whether Mr. McMullen or the San Francisco Bridge Company, by him, bid for the work of the submerged pipe.

(Same objection.)

A. They did.

Q. I will ask you if Hoffman & Bates bid for that work.

(Same objection.)

A. They did not bid for that work.

Q. State whether or not the work of laying the submerged pipe was let in pursuance of the bid received on that day.

(Same objection.)

[335] A. It was not. There was no contract awarded on that day.

Q. Were advertisements made for bids later for the same work.

(Same objection.)

A. Yes, for the same work.

Q. What was the date of the second letting of the submerged pipe?

(Counsel for complainant, by agreement of defendant's counsel, here enters a general objection to any bid upon or contract for any other work than that for manufacture and laying of steel pipe and other incidentals pertaining thereto, which is in controversy in this suit, and the time such other distinct part

of the work may have been let or contract therefor entered into, on the ground that the same is irrelevant and immaterial.

A. The second letting was August 15, 1893.

Q. Was the San Francisco Bridge Company or Mr. McMullen or the San Francisco Bridge Company, by Mr. McMullen, a bidder at that letting?

A. They were not.

Q. Was Hoffman & Bates a bidder?

A. Hoffman & Bates bid.

Q. To whom was that contract awarded?

A. That was awarded to the Oregon Bridge Company.

Q. It was not awarded to Hoffman & Bates?

A. It was not awarded to Hoffman & Bates.

Q. Have you any data by which you can tell by whom the bid of Hoffman & Bates was submitted—that is, the person who submitted it—have you any means of knowing?

[336] A. Well, the bids were submitted by letter in a sealed envelope. There was no party that knew what they contained. They were all opened at the same time.

Q. Had you any knowledge or information at the time the bids were received on the first of March, 1893, of any agreement between Hoffman & Bates and McMullen as to their interest in the bid?

A. I had no knowledge whatever.

Q. Had you any information or any means of knowing that the bid of the San Francisco Bridge Co. by John McMullen was put in for any other purpose than in good faith?

A. I had no means of knowing that. I had no knowledge whatever beyond the written bid which was submitted to the committee. I had no conversation or understanding with any contractor.

Q. How was that bid regarded by the committee as to other bids that were presented there being presented in good faith?

A. They were all accepted as presented in good faith. No exception was made to any bid at all, and the contract was let to the lowest bidder.

Q. It was understood to be so presented by the bidders?

A. It was understood to be.

Q. So far as the committee was concerned?

A. As far as my knowledge goes it was.

Cross-Examination.

Questions by Mr. L. B. COX:

[337]

Mr. COX.—Subject to the ruling of the Court upon the objections to the direct interrogatories counsel for complainant now propounds the following questions to the witness:

Q. Is it not a fact, Colonel, that before these bids were opened or considered that you had made full estimates in regard to all of the work for which bids were submitted, so as to determine the reasonable cost of doing the same?

A. I did make that estimate.

Q. It is a fact, is it not, that this estimate had been submitted to the committee, and was before the committee at the time these bids were opened?

A. My estimates had been submitted to the committee; I do not know whether they were before the committee at that time.

Q. How long prior to this time had they been submitted?

A. Well, I suppose my last estimate was probably about three months before the letting of the bids.

Q. Is it not a fact that the committee made comparison between the bids offered and your estimates before letting the contract?

A. I do not know what they did; I cannot say that they made any comparison.

Q. You were not present and do not know personally?

A. I was not present. I have no knowledge of any comparison made.

[338]

Q. Did you not advise the committee from time to time as its engineer in regard to the cost of doing this work, prior to the time these bids were opened and the contracts let?

A. How do you mean, during the progress of the work or prior?

Q. Prior to the time the bids were opened.

A. Yes; I made a great many estimates from 1886 to 1893, and while the work was going on I made a great many estimates for them; I do not remember the dates. I estimated the cost and made a full report.

Q. That had all been submitted to the committee before the bids were opened.

A. It had all been submitted to the committee before the bids were opened.

Q. Did not the committee in the matter of those bids reserve the right to reject any and all bids?

A. They did.

Q. And without the necessity of assigning any reason therefor?

A. That is the fact; they reserved the right.

Q. How many bids altogether were offered on the manufacturing and laying of the steel pipe?

A. There were eight bids.

Q. Please give the names of the respective bidders and the amount bid by each.

A. The Risdon Iron & Locomotive Works, \$600,737; the Bullon Bridge Co., \$533,507; Oscar Huber, \$521,775.40; San Francisco Bridge Co., \$514,664; Wolff, Buener & Zwicker, \$495,682; Ferry Hinckle & Robert Wakefield, \$481,040; E. W. Jones & O. W. Wagner, \$477,552.00; Hoffman & Bates, \$465,667.00

Q. These bids were all before the committee and taken under consideration at the time of the award to Hoffman & Bates was made, were they not?

A. They were all opened on the same day at the same time.

Q. And all given consideration?

A. All given consideration, yes.

Q. How did the estimate which you had made on the work of manufacturing and laying the steel pipe compare with the bid put in by the San Francisco Bridge Co. for that work?

A. I think that my estimate was larger than the estimate of the San Francisco Bridge Co. I estimated a larger price for the iron.

Q. Your aggregate estimate was larger than the bid which the San Francisco Bridge Company put in?

A. Yes, sir.

Witness excused.

P. L. WILLIS is called as a witness for the complainant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. What is your occupation? A. Lawyer.

[340] Q. What, if anything, have you had to do with the estate of Lee Hoffman deceased?

A. I have attended to some business for Mrs. Hoffman.

Q. She is the executrix of the will?

A. She is the executrix of the will of Lee Hoffman, deceased.

Q. I will ask you if you have in your possession the books belonging to the state showing entries pertaining to the work done by Lee Hoffman in manufacturing and laying steel pipe and other matters connected therewith in bringing Bull Run water to the city of Portland under a contract made by the city of Portland, acting through its water committee, dated March 10th, 1893.

A. I cannot answer about the date of the contract. I have a number of books, and so far as I know about the books they relate to the contract between Hoffman and the city.

Q. You are familiar with the books relating to that work?

A. Yes.

Q. I will ask you to state, Mr. Willis, whether or not you have two certain cash books relating to this transaction?

A. I have two cash books.

Q. Will you produce them, please?

(Witness produces the books.)

Q. I understand that those are cash books kept by Hoffman in connection with the work under consideration?

A. I understand that to be the fact, though I have no knowledge on the subject, except in a general way.

[341] Q. They purport to be such books? A. Yes.

Mr. MALLORY.—I make an objection that the books are not sufficiently proven.

(Counsel for complainant offers in evidence the two books produced by the witness, and the same are received and filed, marked "Complainant's Exhibit No. 8." and "Complainant's Exhibit No. 9.")

Q. I will ask you if you have a book known as an "Extra-Work Book?"

A. I have a book which appears to contain an account of an extra or force book. (Witness produces the book referred to.)

(Counsel for complainant offers in evidence the book last produced by the witness, and the same is received and filed, marked "Complainant's Exhibit No. 10.")

Q. Have you a journal?

A. I have. (Witness produces the book referred to.)

(Counsel for complainant offers in evidence the book last produced by the witness, and the same is received and filed, marked "Complainant's Exhibit No. 11.")

Q. Have you a ledger?

A. I have. (Witness produces a ledger.)

(Counsel for complainant offers in evidence the book last produced by the witness, and the same is received and filed, marked "Complainant's Exhibit No. 12.")

Q. Have you an index to this ledger?

A. Yes. (Witness produced the index.)

12] (Counsel for complainant offers in evidence the book last produced by the witness, and the same is received and filed, marked "Complainant's Exhibit No. 13.")

Q. Have you the book kept as a trial balance?

A. I have a book of trial balances.

(Counsel for complainant offers in evidence the book last produced by the witness, and the same is received and filed, marked "Complainant's Exhibit No. 14." Counsel for the defendant object to Exhibits No. 8 to 14, inclusive, for the reason that they are immaterial and irrelevant. Subject to the above objection, it is stipulated between counsel for complainant and defendant that the entries in the books may be taken as evidencing the facts in regard to the transactions of which they purport to speak. That either party may have leave to refer to the same upon the trial and argument of the case without any objection as to the manner of their proof.)

Q. I will ask you to state, Mr. Willis, if you have a certain paper known as voucher No. 514, bearing date the 10th day of January, 1894.

A. I have a paper designated as voucher 514 purporting to have been paid January 10, 1894.

Q. I will ask you if you were acquainted during his lifetime with the handwriting of Lee Hoffman, deceased.

A. I have seen Mr. Hoffman write frequently.

Q. You would recognize his handwriting from that fact?

A. Well, that is a difficult question to answer; I have seen so much testimony on that subject, that I am slow to answer that I would know his handwriting.

Q. Do you know his signature?

[343] A. Well, I can't say absolutely that I know his signature. I have seen Mr. Hoffman write frequently, and if I should see writing I could tell whether it looked like his. I would have an opinion as to whether it was or not.

Q. I will ask you to state what your opinion is as to the signature appended to the voucher being the genuine signature of Lee Hoffman.

A. I should accept as his genuine signature. I believe it is.

Q. There is a paper pasted on the face of the voucher on which there is some writing; I will ask you to state if you know in whose handwriting that is.

A. I cannot say that I know, yet I believe that it is Mr. Hoffman's handwriting.

(Counsel for complainant offers in evidence the paper last shown the witness. Defendant objects on the ground that it is immaterial and irrelevant and not shown to have any connection with this case. The paper referred to is received and filed, marked "Complainant's Exhibit No. 15," G. A. B., Ex.)

Q. I will ask you to state if you have in your possession voucher No. 1,009, dated October 12, 1894.

A. I have a paper which I understand is voucher 1,009, and purports to have been paid on the 12th of October, 1894. (Witness produces the paper referred to.)

Q. I will ask you to state whose signature is that appended to the voucher, if you know.

A. I cannot state that I know, but my opinion is that it is Mr. Hoffman's signature.

Q. Lee Hoffman's? A. Yes, sir.

[344] (Counsel for complainant offers in evidence the paper last produced by the witness. Objected to as immaterial and irrelevant. The paper referred to is received and filed, marked "Complainant's Exhibit No. 16," G. A. B., Ex.)

Q. I will ask you if you have in your possession voucher No. 947?

A. I have, as I understand, voucher No. 947. (Witness produces a paper.)

(Counsel for complainant asks that the paper last produced by the witness be marked for identification by the examiner, and the paper is marked "For Identification No. 1, Jan. 15th, 1896," G. A. B., Ex.)

Q. I will ask if you have in your possession voucher No. 1,027.

A. I have what I understand to be voucher No. 1,027. (Witness produces a paper.)

(Counsel for complainant asks to have the paper last produced by the witness marked for identification by the examiner, and the paper is marked "For Identification No. 2. Jan. 15th, 1896." G. A. B., Ex.)

Q. Have you in your possession voucher No. 1,176?

A. I have what I understand to be voucher 1,176. (Witness produces a paper.)

Q. Whose signature is that appended to the bottom of the exterior of the paper?

A. I should think that was Mr. Hoffman's signature.

(Counsel for complainant offers in evidence the paper last produced by the witness. Objected to as incompetent and immaterial. The paper referred to is received and filed, marked "Complainant's Exhibit No. 17." G. A. B., Ex.)

Q. Have you voucher No. 1,197?

45] A. Yes, I have what I understand to be voucher No. 1,197. (Witness produces a paper.)

(Counsel for complainant offers in evidence the paper last produced by the witness. Objected to as incompetent and immaterial. The paper referred to is received and filed, marked "Complainant's Exhibit No. 18," G. A. B., Ex. The defendant also objects to the admission of the paper as irrelevant.)

Q. A subpoena was served upon you asking that you produce the following papers: Checks No. 1,256, 2,280, 2,482, 2,515, 2,560, and a check drawn the 5th day of August, 1895 by Julia E. Hoffman executrix, for \$13,882.66, and a certificate of deposit on the banking-house of Ladd & Tilton for \$40,000.00, dated June 17, 1895, all of said checks having been drawn on the same institution; I will ask you to state if you have those papers.

A. I have never, to my knowledge, seen any of those papers. If any of them are in my possession I have no knowledge of it.

Q. Did you make search for them?

(Objected to as immaterial and irrelevant.)

A. I did.

Q. Have you similar papers, those in company with which these would be expected to be found?

(Same objection.)

A. I can scarcely answer that question except to say that I have in my possession some checks drawn by Hoffman & Bates on Ladd & Tilton that appear to have been returned on settlement with the bank.

Q. Relating to this same matter--this Bull Run contract?

[346] A. I understand they do.

Q. Did you search where you would expect to find these papers that you were unable to find?

(Same objection.)

A. I did, yes. That certificate, I can state, has never been in my possession, because it is too valuable a paper to have been tossed about without attention. If anything of that kind had been delivered to me I would have understood it and taken care of it. But canceled checks may be there with other papers in my possession, but I have looked with as much care as I could after receiving the subpoena and I did not find any.

Q. I will ask you to state, Mr. Willis, if you know who were the sureties on the bond that was given by Hoffman to the city of Portland on this Bull Run contract for manufacturing and laying steel pipe?

(Objected to as immaterial.)

A. My impression is that I was on his bond. I have been on several bonds for Mr. Hoffman, and I am not certain but this was one.

(It is agreed that P. L. Willis and G. W. Bates were the sureties upon the bond in question.)

Q. What is the fact as to your having been the legal adviser of both Hoffman and the San Francisco Bridge Company prior to the execution of this bond?

(Objected to as immaterial.)

A. I did attend to some business for both Hoffman and McMullen.

Q. Who was Bates; what was his relations or what had they been with Hoffman?

(Same objection.)

[347] A. Bates at one time was a partner in the firm of Hoffman and Bates, several years ago. At the time of the execution of that bond I do not know of any intimate business relation between them.

Q. You mean he was a partner with Lee Hoffman?

A. He had been.
No cross-examination.
Witness excused.

Thereupon the taking of testimony herein is adjourned until to-morrow morning, January 16th, 1896, at 9:30 o'clock.

[Signed]

GEO. A. BRODIE,

Examiner.

Office of G. A. Brodie, Examiner.

Portland, Oregon, Jan. 16th, 1896, 9:30 A. M.

At this time, pursuant to adjournment, appear the parties herein as before, and thereupon the following proceedings are had to-wit:

A. DONNELL is called as witness for the complainant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. Were you acquainted with Lee Hoffman in his lifetime?

A. I was.

[348] Q. Were you ever in his employ?

A. Yes, sir.

Q. Do you know anything about the work done by Hoffman in the manufacture and laying of steel pipe and other work connected therewith under a contract with the water committee of the city of Portland for the bringing of Bull Run water to the city?

A. Yes, sir.

Q. You may state whether or not you were in his employ during that time.

A. I was.

Q. In what capacity?

A. During that time I was employed as purchasing agent and paymaster.

Q. Were you in the office?

A. Yes, sir, a portion of the time.

Q. Who kept the books during that time?

A. Mr. E. M. Arthur.

Q. Were you familiar with them?

A. Yes, sir.

Q. Witness is shown "Complainant's Exhibit No. 15." In whose handwriting are the words in writing first found on this

exhibit, "Portland, Or., Jan. 1, 1894, Lee Hoffman, for salary from May 1st, 1893, to Jan. 1, 1894, as per bill attached 8 months at \$1,000.00 per month, \$8,000.00," and the words at the conclusion of the voucher, "Jan. 10th, 1894. \$8,000.00."

(Objected to as immaterial.)

A. Do you wish me to state in whose handwriting that is?

Q. Yes. A. That is mine.

[349] Q. In what capacity or for what purpose did you prepare the writing?

(Objected to as immaterial.)

A. Well, I suppose as manager of the office.

Q. Manager in what capacity; what were your functions as manager?

A. Well, in charge of the office matters; such as looking over the books, making vouchers, pay-rolls, taking receipts and such matters—general office work.

Q. Well, now, I will ask you to what work this voucher related?

(Objected to as immaterial.)

A. Well, I do not know any further than what the bill attached called for. The bill states what it was for, I think.

Q. To what account was it charged?

(Objected to as immaterial.)

A. I think it was charged to incidental account, as we had no other account that would cover that without making an extra account.

Q. What, the incidental account of Hoffman's general work, or the incidental account against any particular account?

A. Incidental account Bull Run pipe line work.

Q. What do you mean by that; do you mean Bull Run pipe work?

(Objected to as incompetent; the books are the best evidence, and the books are in evidence.)

A. I mean the work for which the books were kept that this voucher is charged in.

Q. Well, do you mean by that the work which was being [350] done by Mr. Hoffman to bring Bull Run water to Portland?

(Question objected to as incompetent and leading.)

A. Yes, the work that was done under that contract.

Q. Now, I will ask you to look at the book "Complainant's

Exhibit No. 12," and Exhibit No. 11 and state if you recognize them, and if so as to what work have they application.

(Objected to as immaterial.)

A. I recognize the books to be the journal and ledger kept for the portion of the Bull Run pipe line work which Mr. Hoffman contracted for.

Q. You may state whether or not they were kept under your direction.

A. A portion of the time they were; not all the time. They were kept with my assistance all the time, but I did not have full charge of office matters during the whole continuance of the work.

351] Q. I will ask you if you can find any entries in the book corresponding with "Complainant's Exhibit No. 15," which has been submitted to you.

A. Do you mean showing the entry of this voucher?

Q. Yes, if there is any. Is there an entry in the books?

A. Yes, sir.

Q. Will you find it, please?

A. Well, the original entry itself is in one of the auxiliary books.

Q. Which one?

A. It is the distribution of vouchers book. It is not here.

Q. I will ask you to look at the ledger and see if you can find an entry corresponding with this voucher.

A. I cannot find an entry in the ledger showing that voucher separately. It was charged to incidental account on the distribution book, and the total of the charge to incidental account would be footed up at the end of the month and be entered in the journal, and then posted to the ledger.

Q. The witness is shown "Complainant's Exhibit No. 16," and is asked in whose handwriting the pen and ink words and figures, "Portland, Or., Oct. 12-4 (1894)," on the face of the exhibit are?

(Objected to as immaterial.)

A. You mean the words "Portland," the abbreviation for Oregon, and the abbreviation for October, and the 12 and 4 is in whose handwriting?

Q. Yes.

A. That is my own handwriting.

Q. Whose signature is that on the back?

A. Which one do you have reference to?

Q. The first one. A. My own.

Q. You may state whether that paper was prepared under our direction.

(Same objection.)

A. It was prepared by me, not under my direction.

Q. It was prepared by you?

A. Yes, sir.

Q. To what work does it relate?

(Same objection.)

A. It relates to the work to which it is charged as shown on the voucher.

Q. Well, what is that?

[352] (Same objection.)

A. Incidental account of Lee Hoffman against the Bull Run pipe line.

Q. The work that you have been talking about?

(Same objection.)

A. Yes, the same work.

Q. Witness is shown "Complainant's Exhibit No. 17"; in whose handwriting is all the pen and ink writing on the face of the voucher and all that on the back, except the name Lee Hoffman and the examiner's notations?

(Objected to as immaterial and incompetent.)

A. That is my own.

Q. To what work did the matter covered by this voucher relate?

(Same objection.)

A. The same work as charged in the previous vouchers.

Q. The witness is shown "Complainant's Exhibit No. 18"; in whose handwriting is all the matter which appears upon the face of the document and all which appears upon its back being in pen and ink, except the name Lee Hoffman and the examiner's notation?

(Same objection.)

A. My own.

Q. To what work did the matters covered by this paper relate?

(Same objection.)

A. I do not know as it covered any particular work.

Q. Well, to what matter did it relate?

[353] A. Well, it related to the transactions indicated at that time.

Q. In what connection?

(Same objection.)

A. Well, in connection with the funds here; the amount on hand at that time.

Q. What funds?

(Same objection.)

A. The funds to the credit of this particular work —the Bull Run pipe line.

Q. On the face of this voucher there is this written matter; "Advanced to be deposited with Ladd & Tilton for three months, on 3 per cent interest bearing certificate, \$60,000.00" I wish you would explain the significance of that entry.

(Objected to as immaterial.)

A. It means this; of course you understand we used in keeping this, the voucher system, and every transaction that was made usually went through the vouchers, and for this particular transaction there was a check drawn for \$60,000 and handed to Mr. Hoffman, which he presented to the bank and asked for a certificate of deposit for three months, and being as he was the one that drew the check, it was drawn in his name, and charged to him in this manner, by the making of the voucher, according to the method of keeping the books.

Q. Then do we understand that the effect of that was to draw \$60,000 from the general account of the works that we have been talking about, and to change it from a deposit to a general account to a special account on certificate of deposit?

(Same objection.)

A. It was simply to put the money on interest.

Q. And change the character of the deposit?

[354] (Same objection.)

A. Well, the money was lying in an open account at the bank, and it changed the character of it to interest bearing; that is what it was done for.

Q. On each one of the Exhibits 15, 16, 17, and 18, there appears the name "Lee Hoffman"; I will ask you to state if you are acquainted with the signature of Lee Hoffman, and if you were at the time these transactions took place?

A. Yes, sir.

Q. And how did you come to know it?

A. Well, by seeing him frequently sign it, and seeing it frequently.

Q. I will ask you to look at this signature, and state in whose handwriting it is, if you know, on each of said exhibits.

A. You mean the name of Lee Hoffman?

Q. Yes.

A. They are in his own handwriting at the foot of these four vouchers.

Q. The witness is shown a paper which has been marked "For identification No. 1"; in whose handwriting is all the matter which appears on the face of this paper, except the slip which is pasted on the face and except the word "Hugh Foy"? I mean the pen and ink matter.

(Objected to as immaterial.)

A. Mine.

[355] Q. To what work did the matters set forth in this paper relate?

(Same objection.)

A. Bull Run pipe line work.

Q. I wish you would explain what the significance of that paper is.

(Objected to on the ground that the paper speaks for itself.)

A. This particular paper is for the first estimate under contract, dated December 7th, 1893, for work done on the Bull Run pipe line as per certificate of engineer attached; that is what it is for.

Q. By whom was that work done?

(Objected to as immaterial.)

A. Well, in fact I do not exactly know; it was done by Italians, dagoes and others.

Q. You misapprehend my question; what connection did Foy have to that work under consideration?

(Objected to as immaterial.)

A. He was a subcontractor.

Q. Now, then explain in connection with Foy's relation to the work what that paper means.

(Same objection that the paper shows for itself, and is immaterial.)

A. It means that this was a subcontract; Hugh Foy's first estimate of work done on the Bull Run pipe line.

Q. Are you acquainted with the signature of Foy?

A. Yes, sir.

Q. Can you say whether or not that is his signature appended to the bottom of that document?

A. Yes, sir, that is his signature.

Q. It purports to be a receipt by him of the amount of money specified on the face of the paper, does it not?

(Same objection, and it is understood that all this evidence [356] is received subject to the same objection.)

A. Yes, sir.

Q. Was the matter specified in that voucher carried into the books?

A. The amounts and figures, yes, sir.

Q. To what account?

A. It was charged to the account as shown on the voucher, "Hugh Foy, Subcontractor."

Q. As an expense in connection with the execution of the work? A. As a payment on his account.

(Counsel for complainant offers in evidence the paper last shown the witness, and the same is received and filed, marked "Complainant's Exhibit No. 19." G. A. B., Ex.)

Q. The witness is shown a paper marked "For identification No. 2"; in whose handwriting is the pen and ink matter on the face of the voucher, except the signature of "Hugh Foy"?

(Same objection.)

A. It is mine.

Q. Whose signature is that appended at the foot of it?

A. That is Hugh Foy's.

Q. What is the character of the transaction?

(Objected to on the ground that the paper speaks for itself.)

A. It shows the final estimate under contract for work on the Bull Run pipe line.

Q. State if that relates to the same matter as the last exhibit?

A. Yes, it relates to the same matter as the last.

(Counsel for complainant offers in evidence the paper last shown the witness, and the same is received and filed, marked [357] "Complainant's Exhibit No. 20." G. A. B., Ex.)

Q. I now show you a book marked on its back "Bull Run Pipe Line, Hoffman & Bates, Distribution Book—Bills," and I will ask you if you are familiar with it.

A. Yes, sir.

Q. What book is it?

(Counsel for defendant objects to the question on the ground that the book speaks for itself.)

A. It what we called the distribution book.

Q. Is that the book to which you referred in your testimony a while ago? A. Yes.

Q. Was that book kept by you or under your direction?
(Same objection.)

A. At times it was kept by me and at other times under my direction.

(Counsel for complainant offers in evidence the book last shown the witness. Objected to by defendant as immaterial. The book referred to is received and filed, marked "Complainant's Exhibit No. 21." G. A. B., Ex.)

Q. Will you now state if you can find entries in that book just offered in evidence of the matter specified in this Exhibit No. 15?

(Objected to as immaterial.)

A. You mean can I show you where that voucher is entered in this book.

Q. Yes. A. Yes, sir, on page 38.

Q. To what books was that carried?

(Objected to as immaterial.)

[358] A. Well, that entry by itself was not carried. It was carried in the aggregate amount taken from this book at the end of the month to the journal.

Q. Will you find the entry in the journal?

A. Here it is on page 34. Incidental account \$8,095.75; the last entry.

Q. You mean the last group of entries?

A. The last entry. It is all considered as one entry.

Q. In common parlance the entry would be a group of entries?

A. Well, speaking in bookkeeping parlance we call it one entry, no matter how long the charges are.

Q. You may state whether or not that entry was carried to any other book.

(Objected to as immaterial.)

A. Yes, sir.

Q. To what book? A. To the ledger.

Q. Will you find it in the ledger, please?

A. Here it is on page 26, 9th line from the bottom.

Q. I wish you would state if you can find any entry, the original entry corresponding to the matters embraced in Exhibit No. 16.

(Same objection.)

A. Yes, I can; it is entered in the same manner; it is entered on page 80 of the distribution book.

Q. To what book was it carried, if any?

A. It was carried in the same manner as shown by the previous voucher, to the journal.

Q. Identify the page.

A. Page 63 of the journal.

Q. It is included in what entry?

[359] A. The amount is divided into two charges; \$12,000 of that amount appears in incidental account on page 63 of the journal, the amount in the journal being \$12,079.76, and the balance of the amount appears on the journal on the same page, 63, being \$15,653.30.

Q. Will you now trace that to the ledger as it appears there?

A. The first amount which is charged to incidental we find on ledger, page 27, \$12,079.76. The second amount is found posted on page 51 of the ledger, being \$15,653.30.

Q. The amount you have last mentioned in the original entry on the voucher consists simply of the name of Lee Hoffman, and in the ledger it stands as you have identified it, "Audited Vouchers," what does that account cover, if you know?

A. It covers various credits which had been made to this account during the progress of the work, up to that date.

Q. Credits of what nature?

A. Well, cash advances, tools, and expenditures, and such as that.

Q. I will ask you to state, if you can find, the original entry of the matters specified in Exhibit No. 17, voucher 1176.

A. The first entry of voucher 1176 appears in the distribution book, page 94, amount \$8,855.04.

Q. It stands there as simply Lee Hoffman; what does it cover.

A. It appears here as charged to Lee Hoffman, as that amount having been received. That entry was carried to the

[360] journal and is found on page 73; it is included in the amount here \$68,855.04.

Q. Do you find the ledger entry?

A. It is posted to the ledger on page 51, being the last debit charge.

Q. Then it is included in another one?

A. I stated that the original amount was included in this amount, in the journal, and that amount is posted to the ledger.

Q. The aggregate amount?

A. The aggregate amount.

Q. What is the amount in the ledger?

A. \$68,855.04.

Q. The witness is shown Exhibit No. 18. Can you find the original entry of the matters specified on the face of that voucher, number 1197?

A. Yes, sir.

Q. Where does it appear?

A. It appears on page 94 of the distribution book. It is included in the same amount that I just mentioned, in journal, page 73, and it is carried in the same amount to page 51 in the ledger.

Cross-Examination.

Questions by Mr. R. MAILLORY:

Q. How long were you in the employ of Mr. Hoffman?

A. About three years and five months.

Q. During any portion of that time were you his confidential clerk?

A. Well, I never heard him call me such.

[361] Q. Were you entrusted by him with authority to sign checks for him?

A. Yes, sir.

Q. You were entrusted with that authority?

A. I was entrusted with authority to sign checks.

Q. You had complete information from him in regard to this business.

A. Well, I do not know; I did on any subject that he wished me to take up and handle; I do not know that I had complete information about all matters pertaining to this work.

Q. In all matters that you were called upon to act for him you were informed by him?

A. I think so.

Q. And had his entire confidence as far as you know?

A. As far as I know, yes, sir.

Q. How long, if at all, after his death did you remain in the employ of Mr. Hoffman?

A. From the time of his death until the first of November.

Q. Did you say the first or 21st—

A. Well, I finished up and turned over matters about the 18th of October, but I assisted until the 1st of November.

Q. Since that time you have not been in his employ?

A. No, sir.

Q. What is your present business?

A. I have none.

Q. Have you any employment at this time.

A. No, sir; none whatever.

Q. Are you in the employ of Mr. McMullen?

A. I am not.

Q. Are you receiving any pay from him in any way?

162] A. No, sir.

Q. Have you any agreement whatever of pay from him?

A. No, sir.

Q. No compensation of any sort from him?

A. No, sir.

Q. Have not had any such arrangement from him?

A. No, sir.

Witness excused.

Thereupon the taking of testimony herein is adjourned until January 22, 1896, at ten o'clock, A. M.

[Signed]

GEO. A. BRODIE,

Examiner.

Office of G. A. Brodie, Examiner, Portland, Oregon.

January 22, 1896, ten o'clock A. M.

At this time appear the parties herein, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

Mr. JOHN McMULLEN, complainant, is recalled in his own behalf.

Direct Examination.

Questions by Mr. L. B. COX:

Q. I show you a letter, dated Portland, Oregon, March 16,

[363] 1893, addressed to J. McMullen, San Francisco, and I will ask you whose signature is appended to that letter.

A. That is Mr. Hoffman's signature.

Q. You may state whether this letter was received by you in the ordinary course of business. A. It was.

(Counsel for complainant offers in evidence the letter last shown in evidence, and the same received and filed, marked "Complainant's Exhibit No. 21 1-2. G. A. B., Ex., without objection.)

Q. I show you a letter dated Portland, Oregon, August 2nd, 1893, addressed to J. McMullen, Esq., San Francisco, and I will ask you in whose handwriting is this letter, if you know, and whose signature is appended to it.

A. It is in the handwriting of Mr. Hoffman and that is his signature.

Q. Was it received by you in the ordinary course of business? A. Yes, sir.

(Counsel for complainant offers in evidence the letter last shown the witness, and the same is received and filed, marked "Complainant's Exhibit No. 21 1-2," G. A. B., Ex., without objection.)

Q. I show you a letter dated Portland, Oregon, June 3rd, 1893, addressed to J. B. C. Lockwood, Esq., engineer, San Francisco Bridge Company, Seattle, Washington; do you know by whom the signature to that letter was made.

A. No, I do not. It is the signature of Hoffman & Bates, by somebody in the firm, possibly Andy. I cannot identify Andy's handwriting.

Q. I will ask you how this letter came into your possession. (Objected to by defendant as immaterial.)

[364] A. It was forwarded to me by Mr. Lockwood.

Q. Who was Lockwood at that time?

(Same objection.)

A. Lockwood was the agent and engineer of the San Francisco Bridge Company, at Seattle, in charge of our office there.

Q. I will ask you if you know what the matters specified in this letter relates to—what work or business?

(Same objection.)

A. It relates to the pipe line contract.

(Counsel for complainant offers in evidence the letter last shown the witness; objected to by defendant on the ground

that the same has not been properly identified; counsel for complainant withdraws the offer of the letter referred to, for the present.)

No cross-examination.

Witness excused.

H. D. BUSH is called as a witness for the complainant, and being first duly sworn, testified as follows

Direct Examination.

Questions by Mr. L. B. Cox:

Q. What is your occupation?

A. Civil engineer.

Q. State what, if any, connection you had with the work
[185] done by Lee Hoffman of Portland, Oregon, in the years 1893, 1894, and 1895, especially in the two former years, in the matter of bringing water from Bull Run to the city of Portland under contract between him and the water committee of the city of Portland.

A. Well, I was in Mr. Hoffman's office, and made an estimate for him of the costs of the work—made out the bids which were put in, and after the contract was awarded to Hoffman & Bates I did what I could to get everything ready for the work, made drawings for derrick, tools, etc., that were used.

Well, you need not speak with detail, nor do I direct your attention to anything that transpired before the actual commencement of the work, after this contract had been let.

Mr. COX.—I also move to strike your answer as to what was done by you in connection with the bid for the work.

Mr. MALLORY.—I object to that, as the answer is entirely responsive to the question.

Q. I ask you what connection you had with Hoffman in the execution of the work under the contract with the city of Portland; just answer generally.

A. Well, as far as the execution of the work was concerned, I made everything ready in the way of preparing tools, etc., for the work.

Q. Were you in Hoffman's employ during that time?

A. Yes, sir. Then during the first two months of the work
[186] I acted as engineer, and Mr. Foy was at that time superintendent. After Mr. Foy went away I was both engineer and superintendent, and had charge of all the work.

Q. I show you a letter, dated Portland, Oregon, April 28, 1893, with a descriptive design, and specifications attached to it, said letter being addressed to George W. Catt, Esq., vice-president, San Francisco Bridge Company, World Building, New York City; by whom was that letter written, if you know?

A. This letter was written by myself.

Q. By whom is the signature thereto attached?

A. Well, that is my writing, Hoffman & Bates, B.

Q. In what connection, or in connection with what work, was that letter written?

A. In connection with the work of building the Bull Run pipe line—preparing the details of it.

Q. During the time of your employ by Hoffman?

A. Yes, sir.

Q. And on his behalf?

A. Yes, sir.

(Counsel for complainant offers in evidence the letter last shown the witness with the documents attached, and the same is received and filed, marked "Complainant's Exhibit No. 23," G. A. B., Ex., without objection.)

Q. I show you a letter, dated Portland, Oregon, May 16, 1893, addressed to George W. Catt, Esq., World Building, New York, signed Lee Hoffman; were you acquainted with the signature of Lee Hoffman during his lifetime?

A. Yes, sir.

Q. How did you learn it?

A. By constantly seeing it.

[367] Q. You may state whether or not that is the signature of Lee Hoffman, in your judgment?

A. In my judgment it is.

Q. Who was Catt at that time, and what was his occupation?

A. Mr. Catt was vice-president of the San Francisco Bridge Company, and had charge of their business in New York City.

Q. Are you familiar with the matters which are referred to in this letter? A. Yes, sir.

Q. To what business did such matters relate?

A. To the business of preparing some tools for work on the pipe line.

Q. This Bull Run scheme? A. Yes, sir.

(Counsel for complainant offers in evidence the letter last

shown the witness, and the same is received and filed, marked "Complainant's Exhibit No. 24," G. A. B., Ex.)

Q. I show you a letter which was exhibited to the witness McMullen, which is dated Portland, Oregon, June 3, 1893, addressed J. B. C. Lockwood, Esq., engineer San Francisco Bridge Company, Seattle, Washington; do you know by whom the signature to that letter was made?

A. That was made by Andy Donnell.

Q. Who was he at that time?

A. Mr. Donnell was general clerk in the office.

Q. Whose office?

A. In the office of Hoffman & Bates—in Mr. Hoffman's office.

Q. I will ask you to state if you know to what business matters that letter related?

A. To the business of getting together an outfit for the work on the Bull Run pipe line.

388] (Counsel for complainant offers in evidence the letter last shown the witness, and the same is received and filed, marked "Complainant's Exhibit No. 25," G. A. B., Ex.)

No cross-examination.

Witness excused.

Complainants rest.

H. D. BUSH is recalled as a witness for the defendant.

Direct Examination.

Questions by Mr. MALLORY:

Q. Mr. Bush, you may state your name, age, residence, and occupation.

A. My name is Harry Dean Bush, 38 years old; my present residence is Springfield, Massachusetts; I am a civil engineer.

Q. Were you ever at any time in the employ of Lee Hoffman?

A. Yes, sir.

Q. When did you first enter his employment, and how long did you remain in it?

A. I entered his employ in September, 1892, and remained until December, 1895.

Q. What business were you engaged in in 1892?

A. The first work was bidding for the Burnside Street Bridge, Portland, and after that I made plans and estimates for any work that happened to come along.

[369] Q. What, if anything, had you to do while you were in the employ of Mr. Hoffman in making estimates or bids for bringing Bull Run water to Portland?

(Counsel for complainant objects to the question as incompetent and immaterial, and now by consent of counsel for defendant, for the sake of convenience, enters a general objection to hold throughout the examination to any and all evidence offered by the defendant touching any matters which transpired in connection with the work of bringing Bull Run water to Portland, on the contract between Lee Hoffman and the water committee of the city of Portland, prior to the execution of the contract between the complainant herein and Lee Hoffman, "Complainant's Exhibit No. 1," on the ground that the same is immaterial.)

A. Mr. Hoffman went to San Francisco some two weeks before the time of opening bids; he instructed me before he went away to make an estimate of the cost of manufacturing and laying pipe so as to be able to prepare a bid on his return.

Q. Do you know what was the result of that estimate as to the cost of manufacturing and laying pipe?

A. Yes, sir.

Q. What was it?

Mr. COX.—Let me ask you if that was in writing?

The WITNESS.—Yes, I have the original estimate here. (Witness produces a document.)

Mr. COX.—The witness having produced the writing, being the estimate which he made, I object to any statement being made therefrom other than the estimate itself.

Q. Have you the paper which was the original writing?

A. I have my original estimates.

[370] Q. You have it in your hands now?

A. Yes, sir.

Q. In whose handwriting is it?

A. It is in my handwriting.

Q. You made it yourself? A. Yes, sir.

Q. You may refer to that estimate or memorandum unless you can do so without and state what was the result of your

estimate.

(Counsel for complainant objects to the question on the ground that it is incompetent.)

A. My estimate of the cost of manufacturing and laying the 42 inch pipe, including the hauling of that part of the pipe was \$36.00 per ton.

Q. Mr. Bush, I will ask you to state what was the result, the final amount—the total amount of your estimate.

A. Well, that does not show on this estimate.

Q. It does not show? A. No, sir.

Q. Have you now any recollection of what it was?

A. It simply means to multiply the number of tons by the cost per ton.

Q. Have you the number of tons there?

A. I have, sir.

Q. When I refer to the work, I mean the entire work, including the cost and profit.

A. This estimate covers a profit of \$9.00 per ton, making the cost of the pipe \$45.00 per ton, and figuring at 2½ cents per ton for 11,782,000 pounds, this would have made the first item \$265,090.00.

Q. Is that the total bid for manufacture and laying the pipe? A. No, sir, that is the amount of the first item.

371] Q. I do not care to go through the details, what I want to know is the total amount, or the final amount of your estimate to be bid for the manufacture and laying of the pipe.

A. The total amount of my estimate was \$420,257.00.

Q. You said that Mr. Hoffman went away to San Francisco, and on his return directed you to make some figures; these are the figures that you submitted to him on his return?

A. Yes, sir.

Q. What occurred on his return, if anything, in relation to preparing bids on this work for the manufacturing and laying of the pipe, plates, etc.?

A. Well, Mr. McMullen came up with him, and Mr. Hoffman informed me that he and Mr. McMullen were going to bid together for the work; Mr. McMullen had a great many estimates and figures and letters referring to the cost of the work, and I went all through those.

Q. Now, state exactly what occurred—what Mr. McMullen said or done about the matter when he came here.

A. I don't think I fully understand the question.

Q. What did Mr. McMullen do—what was said or done by him about this matter on Mr. Hoffman's return; did he bring the papers with him, or say anything about the work?

A. He brought a lot of papers in the office, and showed them to me and said that represented the result of researches on the Bull Run pipe line, and that there were estimates there from the New York, and also from the San Francisco office.

Q. By whom were the estimates made at the New York office?

[372] A. There were complete estimates made by Mr. Catt, going into all the details, and the cost of the job, plant, tools, etc.

Q. I will call your attention to this paper, and ask you if you know what it is. (Showing witness a paper.)

A. This particular sheet, (referring to the first page of the paper) is a copy of Mr. Catt's estimate of the job for making the pipe.

Q. What is the next sheet?

A. This (referring to the second sheet) is a copy of Mr. Catt's estimate of the cost of making the pipe.

Q. And the next, if there is any more?

A. This (referring to the third page) is a copy of Mr. Catt's bid as he had made it out, and set down opposite those items are the figures that we actually put in, showing the difference between the two.

Q. What do you know about those figures as to whether they are the same figures or copies of the same figures that were presented to you by Mr. McMullen on Mr. Catt's bid?

A. Well, I copied those myself, and I am certain it is an exact copy.

Q. Who furnished you with the original of that?

A. Mr. McMullen brought a copy to the office.

Q. Did you ever have any talk with Mr. McMullen about Mr. Catt?

A. Yes, sir, I think McMullen said it was Mr. Catt's estimate.

Q. What is the total of the estimate of Mr. Catt for the manufacture and laying of the pipe?

[373] (Counsel for complainant objects to the question on the ground that it is incompetent.)

A. The total for manufacturing and laying the pipe is \$416,038.00.

Q. What, if anything, was done in regard to preparing any other bid than that by Mr. McMullen and Mr. Hoffman and yourself?

A. Well, Mr. Hoffman thought that all the bids we had prepared were too low, and I made out other bids which were higher.

Q. And what was the final total of the bid that you made out, or which was made out for you by Mr. Hoffman?

A. The final total of that bid that we expected to put in, until within the last hour, was \$479,167.00.

Q. \$479,167.00? A. Yes, sir.

Q. What was the bid that you actually put in?

A. \$465,667.00.

Q. How did that come to be reduced?

A. Why, Mr. McMullen came into the office within the last hour, very much excited, and said that he had made up his mind that we were too high, and had got to take off something; we took off five cents a yard on the item of earth excavation; this amount is 270,000 yards at five cents a yard, amounting to \$13,500.00.

Q. That reduced the amount from \$479,167.00 to \$465,667?

A. Yes, sir.

Q. What did you say your estimate on the excavation was?

A. 35 cents a yard on 270,000 yards.

[374] Q. Now, have you had any conversation, or heard any conversation between Mr. McMullen and Mr. Hoffman about bidding for this work, and if so, I wish you would state what it was.

(Counsel for complainant objects to any statements which may have been made by Mr. Hoffman in this connection, on the ground that they were incompetent.)

A. Well, they had various conversations about the bidding—that they would bid together, so as to try to get as much of the work as possible, and it was decided finally that Hoffman & Bates' bid should be the lowest, or lower than the San Francisco Bridge Company's bid for the manufacturing and laying of the pipe and the San Francisco Bridge Company's bid should be lower than Hoffman & Bates' bid for furnishing the

plates, so that there might be a change to combine those two bids on both those two items.

(Counsel for complainant objects, and moves to strike out the testimony of the witness in regard to any other bid or work, except that now under consideration and involved in this suit, on the ground that it is irrelevant and immaterial, and I make the same objection to all of this testimony for convenience sake.)

Q. You speak of a bid being put in by the San Francisco Bridge Company; explain what you mean by that, and what there was about that.

A. It was understood between Mr. Hoffman and Mr. McMullen—

(Counsel for complainant objects to this testimony as to any understanding between Hoffman and McMullen, on the ground that it is incompetent.)

[375] Q. State as nearly as you can, M. Bush, what was said by Mr. Hoffman and by Mr. McMullen as to the manner in which they would each bid—what should be done, giving all the particulars of it as nearly as you can, what they said and if you cannot remember their language give it as nearly as you can.

(Counsel for complainant interposes same objection as to Hoffman's statement.)

Mr. MALLORY.—If you don't remember what was said, state the substance of what it was, and what the result of it was, if you remember.

(Same objection.)

A. Well, there was a great many conversations in my presence, the general idea being that they would each bid.

(Counsel for complainant objects to the testimony of the witness as to any general idea on the ground that it is incompetent.)

Q. Go on and state what it was.

A. Each would bid on his own account, and they would share in whatever portions of the work they might be successful in getting; as I before stated, Hoffman & Bates' bid should be lower for the manufacture and laying, and the San Francisco Bridge Company's bid should be lower on the delivery of the plates; that was the day the bids should be opened; that combination they were making to get as much of the work as possible.

Q. In what way? A. By combining—

(Counsel for complainant objects to this testimony as to what occurred the day the bids were opened, on the ground that it is immaterial and irrelevant.)

[376] A. (Continued.) By combining Lee Hoffman's bid on the manufacture and laying with the San Francisco Bridge Company's bid on the delivery of the plates, or if there was no bid between that combination—the Hoffman & Bates' bid on the manufacture and laying, and the San Francisco Bridge Company's bid on the delivery of the plates—that the San Francisco Bridge Company was to try to withdraw their bid on the delivery of the plates, so that the whole work should go to Hoffman & Bates.

Q. Did you hear anything said about the bid which was prepared by the San Francisco Bridge Company to put in—what was said about that, and how it was prepared?

(Counsel for complainant objects to this question, unless it is specified by whom these statements were submitted to him; question withdrawn.)

Q. Did Mr. Hoffman and Mr. McMullen or either of them, say anything about a bid being put in by McMullen in the name of the San Francisco Bridge Company?

(Counsel for complainant objects to any statements made by Mr. Hoffman on the ground that they are incompetent.)

A. Well, only in a general way, that the San Francisco Bridge Company should be higher on the manufacture and laying.

Q. It was understood that that should be done?

(Same objection.)

A. Yes, sir.

Q. Do you know whether Mr. Hoffman saw the bid of the San Francisco Bridge Company? A. Yes.

Q. Did Mr. McMullen show him their bid?

[377] A. Yes, sir.

Q. They each knew the other's bid? A. Yes, sir.

Q. The estimate that Mr. McMullen brought here of his engineer, Mr. Catt, what was the condition of that as to its being ready to be submitted as a bid for the work?

A. It was all ready to be submitted.

Q. Did it require any additional figures, or anything more than to put it in upon a form of the bid? A. No, sir.

Q. Now, what, if you know, was said by Mr. McMullen as to his intention of putting in his bid the estimate furnished by the engineer, Mr. Catt, of \$416,038.00 and if he did not put it in at that rate, state why, and state what reasons were given.

A. I think Mr. McMullen said that he was satisfied that was a perfectly safe bid; that Catt had gone over the thing very thorough.

Q. The reason that he did not put in that bid was because they thought they could get more money out of the job?

A. Yes, sir.

Q. At whose instance was it raised?

A. Well, Mr. Hoffman was always skeptical about doing the work for such little money, and kept on trying to have the bid increased.

Q. Do you know what was the bid of Hoffman & Bates for supplying the steel plates for the pipe?

(Counsel for complainant objects to the question as irrelevant.)

A. Yes, sir.

Q. What was the amount of the bid that was agreed between Hoffman and McMullen as to the bid which should be submitted for supplying the plates?

A. You mean the bid that should be submitted by Hoffman & Bates?

Q. Yes.

A. The bid submitted by Hoffman & Bates was \$359,378.80.

Q. Now, do you know what was the bid for the same material by the San Francisco Bridge Company?

(Same objection.)

A. The San Francisco Bridge Company's bid for the delivery of the plates was \$348,781.00.

Q. What, if anything, was agreed upon between Hoffman and McMullen as to what should be done in case the bid of the San Francisco Bridge Company submitted by Mr. McMullen should be the next lowest to the bid of Hoffman & Bates on the item of furnishing the steel plates?

(Counsel for complainant object to the question as leading and suggestive, and also as irrelevant.)

A. Well, the bid of the San Francisco Bridge Company was lower than that of Hoffman & Bates.

Q. What, if any, agreement was there between them as to what course should be pursued by the San Francisco Bridge Company in case no bid was between the bid of Hoffman & Bates and the bid of the San Francisco Bridge Company?

(Same objection.)

A. Well, there was no agreement about any such contingency as that, Judge.

[379] Q. We will put it in another way; was there any agreement or understanding between Mr. McMullen and Mr. Hoffman as to what McMullen should do, or the San Francisco Bridge Company should do, in case their bid for the steel plates was the next lowest to the bid of Hoffman & Bates—as to the San Francisco Bridge Company withdrawing from the bid, or trying to withdraw from the bid and let the work go to Hoffman & Bates?

(Same objection.)

A. Well, there was some talk of either one of them withdrawing, if by doing so they could combine the bids to better advantage or get more work.

(Counsel for complainant objects to the question as irrelevant the witness after "there was some talk" about these matters, as being incompetent.)

Q. Well, you may state as nearly as you can, Mr. Bush, what agreement was had between them upon that subject.

(Counsel for complainant objects to the question as irrelevant.)

A. The agreement was about a combination of the bids on the two items of manufacturing and laying and the delivery of the plates; that those two items should be combined in the two bids in the best way that they could to get the most money out of the job; that in case the San Francisco Bridge Company's bid for the plates combined with the Hoffman & Bates' bid for the manufacture and laying made the lowest total, then the bid should be combined, and in case there was no bid between those two bids—between that total I have just spoken of—the total of the Hoffman & Bates bid on the manufacture and laying and the San Francisco Bridge Com-
[380] pany on the delivery of the plates, then the San Francisco Bridge Company should withdraw their bids for the plates.

Q. That could not only be ascertained when the bids were opened?

A. Yes, sir.

Q. Then, if I understand you, if it was ascertained upon opening the bids that the bid of Hoffman & Bates should prove to be the lowest bid for the manufacture and laying of the pipe, and the bid of McMullen, or the San Francisco Bridge Company, should prove to be the lowest for furnishing the plates, and that those two together would make the lowest total, it was agreed that the San Francisco Bridge Company should endeavor, if they could, to get relieved from their bid, and let Hoffman & Bates take it on their bids for the plates?

A. If there was no bid between?

Q. Yes, if there was no bid between, but as a matter of fact there was a bid between.

A. Yes, and there was a bid lower than the total of those two bids.

Q. There was a bid between the bid of the San Francisco Bridge Company on that particular work—on the plates, I mean now?

(Counsel for complainant objects to the question as irrelevant, and also desires to know what the witness' source of information was concerning these outside matters.)

A. Well, there was no bid between those two on the plates, but there was a bid lower than either of them; there was a bid of the Risdon Iron Works.

Q. So that the bid both of the San Francisco Bridge Company and Hoffman & Bates was higher than the bid of the Risdon Iron Works?

(Same objection.)

A. Yes, sir.

Q. Did you observe the bids that were submitted by the San Francisco Bridge Company and Hoffman & Bates on the iron for bridges included in the same bid that was submitted to the committee?

(Objected to as irrelevant.)

A. Yes, sir.

Q. Do you know what was the bid for bridges by Hoffman & Bates?

(Same objection.)

A. Hoffman & Bates' bid for the bridges was \$33,562.94.

Q. What was the bid of the San Francisco Bridge Company?

A. Their bid was \$31,279.07 for bridges.

Q. Do you know what was the bid of Hoffman & Bates for head works, included in that bid?

(Same objection.)

A. Hoffman & Bates' bid for head works was \$17,800.00.

Q. And what was the bid of the San Francisco Bridge Company for the head works?

(Same objection.)

A. \$16,550.00.

Q. After the letting of this work—this contract—what did you do?

A. You mean as regards construction?

[382] Q. Yes, sir.

A. Well, there was a space of three months before the work actually begun, and I did everything I could towards getting ready, getting tools prepared, and when the work first started my principal work was going back and forth between the shop and field, trying to get the pipe out there, and getting the pipe made fast enough at the shop; the subcontractors were very slow at first in getting the pipe from the shop; and in a general way I got ready all the tools for riveting, and I hired a good many riveters and sent them out—riveters and calkers—and I went over to Vancouver at one time; I only got one man there that I intended to make a foreman of; he afterwards had a subcontract for the riveting and calking. Mr. Foy was made superintendent of the work.

Q. What time?

A. At the beginning of the actual construction.

Q. Do you know when that was?

A. That was early in June.

Q. How long did he continue as superintendent?

A. I think until the 1st of November, 1893.

Q. Of the same year? A. Yes, sir.

Q. Who became superintendent after he quit?

A. I was superintendent after that time.

Q. Until the completion of the work?

A. Yes, sir.

Q. Do you know what Mr. Foy did, if anything, in connection with the work after he ceased to be superintendent?

[383] A. After he ceased to be superintendent he had a contract for excavation—excavating the ditch from the head works down to pretty close to Mr. Andre's house on the line; I think

it was about four miles of ditch.

Q. While he had that contract he was not then superintendent? A. No, sir.

Q. You were superintendent then?

A. Yes, sir.

Q. What do you know, if anything, Mr. Bush, about some plant that was brought over here from Seattle?

A. There was a kind of grading outfit brought over—some scrapers, plows, tents, and cook utensils.

Q. Do you know what those things were worth?

A. Well, I would not know exactly.

Q. Can you make an estimate—something near what they were worth?

(Objected to on the ground that the witness is not competent to answer.)

A. I think the bill was something like \$2,800.00. Mr. Hoffman said the bill was pretty high.

Q. I will ask you now if you are acquainted with such material as that, and with the prices of such material as that.

A. Well, I could not make a price; no, sir. I would have to get prices.

Q. You would not be able to give an opinion as to this work? A. No, sir.

Q. Were you about the place and upon the work nearly all the time from the time that you began in June until the end of the work?

A. Yes, sir, nearly all the time.

Q. Do you know what Mr. McMullen did about the work?

A. Well, he came out there two or three times to see us.

[384] Q. How many times do you think he was out there—do you remember of his being there?

A. I remember not more than three times.

Q. When was that, do you know?

A. I think he was out there twice in 1893 and once in 1894.

Q. About what time in 1894?

A. He drove out there when we were working on the section line road; it was in June, I think.

Q. Did he come alone? A. Yes, sir.

Q. What did he do while he was there?

A. He looked at the work.

Q. How long did he stay?

A. I think two or three hours.

Q. While this work was going on, what was Mr. Hoffman doing—where was he?

A. Well, he was out on the line very often, and was away in the city looking after supplies.

Q. Do you know about Mr. Hoffman having gone to Chicago in 1893? A. Yes, sir.

Q. About what time was he gone—how long?

A. Well, I could easily tell from the letter book I think he was gone about three weeks in the month of October, as I remember it.

Q. Who was in charge of the work during his absence?

A. Well, Mr. Foy and myself; I was in charge of Mr. Hoffman's part of the work; I had authority to represent him at the water committee, and look after the receipts and estimates [85] and make any arrangements that were necessary there.

Q. Was anything to be done by Mr. Hoffman that was neglected in consequence of being away?

A. I think not.

Q. Do you know of Mr. Hoffman having visited Yellowstone Park while you were in his employ?

A. I think Mr. Hoffman went to Yellowstone Park in the summer of 1895, when the work was all over; that is my impression.

Q. Do you know of his having made a journey to the Sandwich Islands sometime in 1895?

A. Yes, sir.

Q. When was that?

A. That was in the spring of 1895.

Q. Before or after the work of laying the pipe was completed? A. It was after it was finished.

Q. It simply had not yet been accepted by the water committee? A. Yes, sir.

Q. Do you know what was the cost of the hydraulic punch and shears that was in use on the work?

A. I think the punch was \$75.00 and the shears was \$150.00.

Q. Were there some forges in use on the line for heating the rivets? A. Yes, sir.

Q. How many of those were there?

A. Well, we bought one dozen at first, and then bought some two or three afterwards.

Q. What were they worth a piece.

A. The list price was \$35.00; I think it was about \$30.00 they actually cost.

[386] Q. Have you any knowledge of who paid for those, or don't you know anything about that?

A. No, sir, I have no knowledge of that.

Recess until 1:30.

Afternoon session; present, the same parties as before. H. D. BUSH resumes the stand.

Cross-Examination.

Questions by Mr. L. B. COX:

Q. Where have you been residing, Mr. Bush, since you terminated your connection with Mr. Hoffman in regard to the Bull Run work?

A. I resided until last July in the city of Portland; then I went east and resided in the town of Sharpsberg, Pennsylvania, and stayed there until the middle of December.

Q. Where have you been residing since?

A. Since that time I have been at home, in Springfield, Massachusetts.

Q. Did you come to Portland at the solicitation of the defendant in this suit?

(Objected to as immaterial.)

A. Partly so.

Q. You were solicited to come for the purpose of giving evidence in this case?

A. Yes, sir.

[387] Mr. COX.—I desire these reporters to note that all cross-interrogatories addressed to witnesses touching matters which happened antecedent to the execution of "Complainant's Exhibit No. 1" are subject to the ruling of the Court as to the materiality of such matters.

Q. I did not quite understand what you said about this combination bidding between McMullen and Hoffman, or the San Francisco Bridge Company and Hoffman. How was it that they were going to combine their bids—on a general average?

A. The Hoffman and Bates' bid on manufacturing and laying was \$465,667.00, and the San Francisco Bridge Company's bid on the plates was \$348,781.00, making a total for the two of \$814,448.00. Now, it was understood if that was the low-

est total that then they were to make an effort to have Hoffman and Bates' bid on the delivery of the plates accepted, and have the San Francisco Bridge Company's bid on the delivery of the plates withdrawn, which would raise the total they were to receive on the delivery of the plates about \$10,000. The exact total would be \$824,945.80.

Q. Then if Hoffman was the lowest bidder on one item and McMullen the lowest bidder on the other item it was agreed that they would drop the low bid on McMullen's item, and endeavor to give the contract to Hoffman if he was the next?

A. Yes, sir.

Q. So, then, they would pool the two bids and substitute for the lowest bid on the plates the next lowest if that was Hoffman's, and divide the proceeds of both contracts?

A. Yes, sir.

Q. You say that McMullen, when he came here, had in his possession an estimate from George W. Catt, of New York, [88] which he represented he was willing to take as a basis of the bid which he would submit for the work?

A. Yes, sir, that is the way I understand it.

Q. You are quite clear in your mind as to that, are you?

A. I am quite clear that Mr. McMullen expressed himself that that would be a safe bid.

Q. How long was McMullen here before these bids were opened? A. I think two or three days.

Q. What day, do you remember, were the bids submitted?

A. I do not remember the exact date.

Q. Was it not the first day of the month?

A. The first or second of the month; I think it was the first.

Q. Your recollection is that McMullen was here three or four days prior to that time? A. Yes, sir.

Q. Now, Mr. Bush, is it not a fact that neither McMullen or Hoffman, nor anybody else to your knowledge who bid on this work, prepared a bid until immediately before it was submitted?

A. Our bid was practically prepared the day before.

Q. Did not you state in your direct examination that about an hour before it was submitted McMullen rushed in in a good deal of excitement and requested it to be reduced some \$13,000.00? A. Yes, sir

Q. Then it was not ready for presentation until about an hour before it was submitted in the form it was submitted?

[389] A. It was not ready in the form it was submitted finally; no, sir.

Q. Now, is it not a fact, Mr. Bush, that both McMullen and Hoffman, during all the time after Hoffman arrived here, were in receipt of advices in regard to estimates on this work, which constantly caused them to change the ideas which they would have upon the date of the receipt of such advices?

A. I do not remember anything that would cause them to change the bid on the manufacturing and laying.

Q. You do not? A. No, sir.

Q. Is it not a fact that slight changes in the matters of freight, cost of material, or cost of labor brought to their attention at any time before their bid was submitted would have a tendency to make a radical difference in the estimates for their bid?

A. I do not know of anything that would be likely to come up that would make radical changes.

Q. You do not? A. No.

Q. Is it not a fact, Mr. Bush, that both Hoffman and McMullen during the several days that you were figuring together on this bid were making changes in their estimates based upon advices which they were receiving from time to time from Mr. Catt, of New York, and from the San Francisco office of the San Francisco Bridge Company and from other quarters?

A. I do not know of anything that was in doubt except the price of plates. The estimate for that was changed, perhaps, in accordance with advices and telegrams received.

Q. What were Hoffman and McMullen doing during these three or four days if it was not necessary for them to keep constantly apprised of these changes, and to shift their grounds on their estimates accordingly?

A. Well, I think they were endeavoring as much as they could to find out what the other fellows were going to bid.

[390] Q. You were representing Mr. Hoffman and assisting him in making estimates, were you not?

A. Yes, sir.

Q. Did you not make a great many estimates, or I will say several estimates during those days?

A. Well, I made several estimates; yes, sir.

Q. And is it not a fact that you were making these several estimates because they had not agreed upon any bid when McMullen first arrived here—neither one of them?

A. Yes, I think it was a fact that they had not agreed upon a bid.

Q. And these different estimates which you were making were in consequence of their want of agreement in regard to the amount of the bid to enable them to finally arrive at a bid which would be satisfactory, and would be submitted to the water committee?

A. Yes, sir.

Q. I show you a telegram dated New York, 27th of February, 1893, addressed "J. McMullen, Hotel Portland, Portland, Oregon," signed George W. Catt; was that telegram before you and did you see it during the time that you were making these estimates on the amount of the bid which was put in for the manufacture and laying of steel pipe?

1] (Counsel for complainant object to the question as immaterial and not cross-examination.)

A. Well, I saw that telegram because there are the pencil marks there that I made.

(Counsel for complainant asks to have the paper just shown to the witness marked by the examiner for identification, and the same is marked "For identification No. 4, January 22nd, 1896," G. A. B., Ex.)

Q. I show you a letter, dated New York, February 22nd or 21st (as both dates are on the letter), 1893, addressed "J. McMullen, President, San Francisco Bridge Company, San Francisco and Portland," signed San Francisco Bridge Company by George W. Catt; did you see that letter during the progress of the estimates you were making?

(Counsel for defendant objects to the question as immaterial and not cross-examination.)

A. Well, I could not certainly say whether I did or not.

Q. You do not remember taking those facts into consideration in your calculation?

A. No, sir.

(Counsel for complainant asks to have the letter last shown to the witness marked by the examiner for identification, and the same is marked "For identification No. 5, January 22nd, 1896," G. A. B., Ex.)

Q. I show you a letter, dated New York, February 22nd, 1893, addressed, "J. McMullen, President, San Francisco Bridge Company, San Francisco and Portland," signed San Francisco Bridge Company by George W. Catt; did you see that letter and act upon it during the course of the estimates you were making for the manufacture and laying of steel pipe?

(Objected to as immaterial and not cross-examination.)

A. Well, I cannot say whether I saw the letter or not, but I certainly did not act upon it.

[392] (Counsel for complainant asks to have the letter last shown the witness marked by the examiner for identification, and the same is marked "For identification No. 6, January 22nd, 1896," G. A. B., Ex.)

Q. I show you what purports to be a press copy of a dispatch, having no date, addressed "J. McMullen, Hotel Portland, Portland, Oregon," and signed H. S. Wood; was that before you at the time you were making your estimates and did you act upon it?

(Counsel for defendant objects to the question as immaterial and not cross-examination.)

A. I do not think I ever saw that before.

(Counsel for complainant asks to have the paper last shown the witness marked for identification, and the same is marked "For identification, No. 7, January 22nd, 1896," G. A. B., Ex.)

Q. In making estimates for the bids which were finally put in by Hoffman in the name of Hoffman and Bates, and by McMullen in the name of the San Francisco Bridge Company, you as representing Hoffman figured jointly with the representative or representatives of McMullen, did you not, in arriving at an estimate upon which the bid should be submitted?

A. I did most of the figuring. Mr. Lockwood was in there some of the time. Mr. McMullen and Mr. Hoffman both came and looked over the figures occasionally.

Q. Who was Mr. Lockwood?

A. He was the Seattle agent of the San Francisco Bridge Company.

Q. Then while you may have done the bulk of the work, the fact is that you and Lockwood were working together and

93] McMullen and Hoffman were supervising, or at all events were cognizant of what you were doing?

(Counsel for defendants object to the question, as assuming that the witness has stated what he has not stated.)

A. Mr. Lockwood was not there but very little. I cannot say that we were working together. Of course, Mr. McMullen and Mr. Hoffman were cognizant of what I was doing.

Q. What was Lockwood doing?

A. He came down here as I understand it to see Mr. McMullen about the bridge business.

Q. About some bridge business?

A. Yes, sir, particularly.

Q. Did McMullen have any other professional visitor here at the time he was preparing the bid on this work except Lockwood? A. Not that I know of.

Q. I show witness a document entitled "Proposals for manufacturing and laying (C)," addressed to Frank T. Dodge, clerk of the water company of the city of Portland, dated March 1st, 1893 (5), and signed San Francisco Bridge Company by J. McMullen, President; did you ever see that before? (Showing the same to witness.)

A. I think that is the bid that Mr. Lockwood made out on the morning of the letting for Mr. McMullen.

Q. Were you present when that was made out?

A. Yes, sir.

Q. Where was it made out?

A. In the office of Hoffman and Bates.

Q. By Lockwood? A. Yes, sir.

[394] Q. Is that his handwriting excepting signature of McMullen?

A. I do not know his handwriting. I remember that he made out a bid; I suppose that is his handwriting.

Q. Then Lockwood was here and he did compute and arrange McMullen's bid? A. Yes, sir.

Q. I show you a similar paper entitled "Steel conduit from head works to Mt. Tabor, proposal for manufacturing and laying," dated Portland, Oregon, March 1st, 1893, addressed to Frank T. Dodge, clerk of the water committee, city of Portland, Oregon (9), signed Hoffman and Bates, per Lee Hoffman; did you ever see that paper before? (Showing same to witness.)

A. Yes, sir, that is the Hoffman and Bates bid for manufacturing and laying.

Q. By whom was it prepared?

A. Well, I prepared a bid similar to this with the figures in writing and Mr. Donnell printed the figuring on the type-writer.

Q. Then that is a transcript of the bid which you prepared?

A. Yes, sir.

Q. Now, is it not a fact, Mr. Bush, that you and Lockwood and McMullen and Hoffman were all cognizant of the contents of both of these bids?

A. Yes, sir, I think it is.

Q. Is it not also a fact that you all were cognizant of both bids put in for the furnishing of the steel plates for this work?

A. Yes, sir.

Q. Hoffman knew what McMullen's bid was and McMullen knew what Hoffman's bid was?

A. Yes, sir.

[395] Q. In the estimate which you made on the manufacturing and laying of steel pipe I understand that you figured on a 42-inch pipe at a cost of \$36.00 per ton and a profit of \$9.00.

A. Yes, sir.

Q. Is that the pipe which was called for and adopted by the water committee?

A. Yes, sir, that particular pipe. I separated the 42-inch pipe from the other on account of the difference in hauling.

Q. It was not all 42-inch pipe?

A. No, sir.

Q. I understand that the aggregate estimate at which you arrived upon which a bid might be predicated for all the work in connection with the manufacturing and laying of the steel conduit from the head works of this system to Mt. Tabor was \$420,257.00.

A. Yes, sir.

Q. Now, that was raised afterwards to \$479,167.00?

A. Yes, sir.

Q. Who made that raise?

A. Hoffman told me to raise it. Hoffman and McMullen talked the thing over that there ought to be more profit in it.

Q. Hoffman and McMullen together?

A. Yes, sir.

Q. What was the occasion of their making the raise?

A. So as to increase the bid. They thought it was safe to increase it.

Q. Is it not a fact that this raise was made in consequence of advices that they were receiving from time to time in regard to the matter?

[396] A. No, sir, it was simply a question of the amount of profit.

Q. Simply a question of profit? A. Yes, sir.

Q. When was this amount of \$479,167.00 arrived at?

A. I think the day before the bids were let.

Q. Then neither you, Hoffman nor McMullen the day before the letting had arrived at any final figures at all?

A. No, sir.

Q. McMullen came back the next morning, as you stated, in a condition of excitement and said that this bid was too high, and that it must be reduced, and it was reduced in consequence of his representation to the figures \$465,667.00, which was the amount of the bid submitted by Hoffman?

A. Yes, sir.

Q. Do you know the amount of the next highest bid?

A. I have it on this sheet (referring to document in witness' hand).

Q. You have given testimony in regard to a number of bids other than the one prepared by you. What was the basis of your knowledge concerning which or upon the strength of which you have testified?

A. Well, this is the official statement of Col. Isaac W. Smith as to all the bids which he had published at that time (referring to document in the hands of the witness).

Q. That was published after the bidding was all done, was it?

A. Yes, sir.

Mr. COX.—I move to strike out all the evidence which the witness gave relative to the bid submitted by persons other than the San Francisco Bridge Company and Hoffman & Bates, on the ground that his testimony in regard thereto is incompetent.

[397] Q. When Mr. McMullen came from San Francisco he had a number of estimates or calculations other than that which you understood had been made by Mr. Catt, had he not?

A. Yes, sir.

Q. Were those estimates taken into consideration in connection with the bid which you afterwards prepared?

A. They were all taken into consideration in the estimate that was made for the actual cost of the work.

Q. And they were all made use of in the calculations in regard to that matter? A. Yes, sir.

Q. And when Hoffman came back from San Francisco just before the letting of this work, McMullen came with him, you say?

A. I think so, yes, sir.

Q. After Hoffman said that McMullen was going to bid with him on the work?

A. Yes, sir; they were going to bid together.

Q. You have identified a paper shown you by counsel for defendants as a copy of the estimate made by Mr. Catt, together with certain changes which were afterwards made, and which gave the aggregate amount of the bid submitted by Hoffman in the name of Hoffman & Bates for the manufacture and laying of steel pipe.

A. Yes, sir.

Q. By whom were these changes afterwards made?

A. I do not understand exactly what you mean.

Q. By whom were the new figures made?

A. The new figures were made by myself. This is a copy of their bid.

[398] Q. How did you make that—just at random, simply arriving at an increase of Mr. Catt's estimate, or by a careful calculation as to what should be submitted on each item?

A. The pencil item is the first one, so many pounds of rivets, and the change in that was made by adding more profit, and the other items, with the exception of the change at the last moment, represented the best information I could get on the subject.

Q. The best information you could get up to the last moment, you say? A. Yes, sir.

Q. Now, I notice the first item to which you refer on the Catt estimate is \$282,768.00, and on your estimate it is \$324,000.00—that is, for manufacturing and laying of the pipe; how did you arrive at that change in figures—just made a guess, or by careful consideration of all elements which would enter into the cost of furnishing the material and doing the work?

A. No, sir; we decided in the beginning that as three estimates of the cost corresponded so closely, that that sum settled the question of cost. After that it was simply a question of how much profit to add.

Q. What estimates do you refer to?

A. The estimates Mr. McMullen brought from San Francisco, by Mr. Wood and Mr. Catt's estimate, and mine.

Q. Then you did take them all three into consideration?

A. Yes, sir.

Q. The next item in this Catt estimate is \$7,500.00, or \$7,560.00 for manholes, and the corresponding item in your estimate is \$4,500.00. There is a reduction of \$3,000—you did not make that for the purpose of increasing the profits, did you?

[399] A. Well, we got so much profit on the first item we wanted to make the other items tolerably close.

Q. Then you figured closely on your estimate for that item of \$4,500.00? A. Yes, sir.

Q. I notice an item here of concrete foundation in the Catt estimate. It is \$720.00, and in your estimate it is \$600.00—you did not make that change for the purpose of increasing the profit on that item? A. No, sir.

Q. Here is an item of sleeve joints, wrought iron, \$700.00 in Catt's estimate, and \$490.00 in your estimate—that was not made for the purpose of increasing the profit, neither, was it?

A. No, sir.

Q. Here is an item for concrete work, \$4,800.00 in Catt's estimate, and in your estimate \$3,200.00; the change was not made there for the purpose of increasing the profit?

A. No, sir.

Q. Here is an item in Catt's estimate of \$90,000.00 for excavation of earth, and in your estimate of \$81,000.00 how did you arrive at that difference?

A. Well, my original estimate for the earth was \$94,500.00. That was the item from which we took off \$13,500.00. That left \$81,000.00.

Q. Then you did not accept Catt's estimate in regard to that item, at all?

A. Well, the variation is very slight.

Q. A variation of \$4,500.00?

A. Well, that is not very much, considering the difference in the principal item.

Q. Now, is it not a fact, Mr. Bush, in regard to the matter of labor, freight rates, and cost of handling material, that no reliance was placed upon Catt's estimate, because he lived in

[400] New York, and was not on the ground and was not familiar with such conditions prevailing here?

A. A reliance was placed on his estimate on the main item for the manufacturing of the pipe.

Q. And on nothing else?

A. Not so much on those minor items.

Q. Is it not a fact that Catt's figures were accepted as a safe guide in the matter of manufacturing the pipe, which was a work that could be done anywhere in the east, where Catt lived, as well as here?

A. Yes, sir.

Q. And was within the control of the man who got this work, but in regard to local matters, things that must be done here that necessarily were subjected to conditions prevailing here, Catt's estimate was not recognized by either McMullen or Hoffman as being the safe guide?

A. No, sir; I do not think that is a fact.

Q. You think that is not the fact?

A. No, sir; that is not the fact.

Q. To what extent was it recognized as being a safe guide?

A. I think it was recognized as being a pretty safe guide all the way through.

Q. I understood you to say a moment ago that it was accepted only as a guide on the manufacture of the pipe.

A. Well, that was the one item that we considered of the greatest importance.

Q. Here is quite a large item for earth excavation, \$90,000.00, according to Catt's estimate, and \$81,000.00 according to your estimate; is it not a fact that Catt was considered to know very little about that matter at all?

[401] A. I do not think so.

Q. Mr. Catt had never been over the ground?

A. He had never been over the ground, but he knew the conditions of the country. He had lived in this country.

Q. Did he know the conditions prevailing on this pipe line in regard to labor and material to be removed?

A. I presume that he did not know the exact conditions—the conditions in detail.

Q. Before you made an estimate on that part of the work you went over the line, did you not, and saw the character of the material to be contended with?

A. Yes, sir.

Q. Every other man who put a bid in on this work did the same thing, did he not?

A. No, I cannot say that. I think there was quite a number of them that did not.

Q. Do you know of others that did do it?

A. Yes; as far as I know of all the parties here there was only one, outside of myself, that went over to the line.

Q. As far as you know? A. Yes, sir:

Q. Now, will you say that it would have been a safe and business-like matter for Hoffman or McMullen to have accepted the estimate of Catt, living in New York, who had never been on the line of pipe and did not know what material was to be moved, as a safe calculation of the cost of doing that work upon which a bid was to be predicated?

(Counsel for defendants object to the question as a mere matter of opinion, and not cross-examination.)

402] A. I think it would be safe for them to accept his estimate within reasonable limits of accuracy.

Q. Hoffman sent you over to the line before he would accept your estimate; is that not the fact?

A. Yes, sir, that is the fact.

Q. And did you not figure with a great deal of care, Mr. Bush, in regard to the estimate you arrived at as to the cost of doing this work?

A. I figured it with all the care I could; yes, sir.

Q. And Hoffman did, and McMullen did? A. Yes, sir.

Q. You say that Hoffman thought that all these items were too low when they were first brought to his attention?

A. Yes, sir.

Q. What do you mean by that; do you mean that he thought they were too low to do the work, or that they might be raised and still get it?

A. He thought it was too low to be safe. He thought if they got the work on those figures they would lose money.

Q. Hoffman was a man of experience?

A. He was a general contractor, yes.

Q. He had done a great deal of that work, had he not?

A. He had never done any pipe-line work.

Q. He had done work of that general character?

A. No, sir.

Q. Had not? A. No, sir.

Q. What did you say in regard to increase of McMullen's bid? You gave some testimony about that on the manufacture and laying of steel pipe.

A. Above Mr. Catt's original estimate, do you mean?

[403] Q. Yes, above Catt's estimate.

A. I do not think I gave any testimony as to that.

Q. It is a fact, is it not, Mr. Bush, that Hoffman deposited a check with each bid to the amount of 5 per cent of the amount of the bid? A. Yes, sir.

Q. And McMullen did the same thing?

A. Yes, sir.

Q. It is also a fact, is it not, that if a party submitted a bid and he proved to be the lowest bidder, but failed to comply with his bid and take the work at that figure, he forfeited his check to the water committee?

A. That was supposed to be the case.

Q. That was supposed to be the case?

A. Yes, sir.

Q. That was the rule or the announcement upon which these bids were submitted, or tendered, or acted upon, was it not? A. Yes, sir.

Q. In reducing Hoffman's bid you made a cut on the earth excavation? A. Yes, sir.

Q. You may state whether you did that in pursuance of a calculation on the subject, or simply made a lump jump at it.

A. Well, we simply did that because it was the handiest place to take it off.

Q. Had you made an estimate before as to what you thought the excavation could be done for per yard?

A. Yes; I thought 35 cents a yard was as low as it could be done with any allowance for profit.

Q. What did the cut which was made on that estimate leave it? A. 30 cents a yard.

Q. Then when you made an estimate of 35 cents a yard you thought that was as low as you could make the figures and do the work profitably? A. Yes, sir.

[404] Q. And when you put it at 30 cents a yard you put it at a figure below what you thought it could be done for at a profit?

A. Yes, sir.

Q. I have a note here which is not quite clear what you

said about Hoffman trying to get the bid increased; what bid was that, do you remember?

A. I think that related to manufacturing and laying.

Q. Whose bid, Hoffman's or McMullen's?

A. Well, I think I referred to that when they were talking about Catt's estimate. My original bid was almost the same as his, within a few thousand dollars.

Q. You mean estimate? A. Yes, sir, estimate.

Q. How close was your original estimate to Catt's all told, on the manufacture and laying of steel pipe?

A. Mine was a little over \$420,000.00, or about \$5,000 higher than Catt's estimate.

Q. You were about \$5,000.00 higher than Catt?

A. Yes, sir.

Q. And it was Catt's estimate that Hoffman wanted to raise?

A. I think that was the one that I was referring to this morning.

Q. What did Hoffman have to do or say in regard to that?

A. He said it was too low; that there was not enough money in it.

Q. He did not think it as profitable at that figure, is that it?

A. Yes, sir.

Q. And he thought if they took it at that figure they would make no money? A. Yes, sir.

405] Q. You say there was no agreement, to your knowledge, about either party withdrawing his bid on supplying the plates, or for supplying the plates?

A. No, sir, I did not say that.

Q. What was the fact in regard to that so far as your knowledge goes?

A. Well, I understood the matter to be, as I stated this morning, if the Hoffman & Bates bid on the manufacture and laying was too high and the San Francisco Bridge Company's bid on the plates was the lowest, then they would try to have McMullen withdraw his bid on the plates and substitute Hoffman's, which was about \$10,000 higher.

Q. You say that after this contract was let you were about three months getting ready for the institution of active operations. A. Well, yes, sir.

Q. What was Hoffman doing during that time?

A. Well, he was keeping after Wolff & Zwicker, because we sublet the shop work to them, and they relieved us of the work of getting the shop together, and Wolff & Zwicker were putting up their plant and getting it installed on the East Side.

Q. And Hoffman was whipping them up? A. Yes, sir.

Q. Now, what was McMullen doing during that time in connection with the matter?

A. I do not know; we had some correspondence with him.

Q. Do not you know it to be a fact that Hoffman's office here was in constant correspondence with McMullen's office, calling upon him to render aid in San Francisco in connection with the same matters that you were engaged upon here?

[406] A. Yes, sir, he corresponded with him to some extent.

Q. A very considerable extent, was it not?

A. Well, I do not know, it might be called so.

Q. Is it not a fact Mr. McMullen, to a great extent, did exert himself in San Francisco to advise Mr. Hoffman in regard to these matters, and to look out for workmen and for implements, tools, and everything of that sort needed for the work?

A. I think he did all he could, apparently.

Q. Is it not a fact that he did all that you called upon him to do?

A. Yes, I think so.

Q. Was it not the agreement, Mr. Bush, that Mr. Hoffman, being the local man on the work, was to have the immediate supervision of it?

A. I understood it so.

Q. From whom did you get that understanding?

A. Well, I think from Hoffman.

Q. And McMullen was not expected, was he, to come up here from San Francisco and take active control of the work, either jointly with Hoffman or singly?

A. No, sir.

Q. I will ask you to state if any call was made upon McMullen at any time you were connected with the office for anything in the way of help toward the execution of this work, except in the matter of supplying money that McMullen did not respond to.

A. I should say that he responded to everything except in [407] the matter of furnishing money.

Q. McMullen furnished, or caused to be furnished, this plant at Seattle for use on the work, did he?

A. Yes, sir.

Q. What other plant was furnished besides that of similar character?

A. A great deal of it was bought here in the city.

Q. What was the value of the plant that McMullen furnished in comparison with what you bought of similar character?

(Objected to as incompetent.)

A. I could only guess at that.

Q. What is your idea about it?

(Objected to as incompetent, immaterial, and irrelevant, and not cross-examination.)

A. I should say it was a very small part of what was used before the job was finished.

Q. What was it during the first summer up to the 20th of September; how did the plant furnished by McMullen correspond with the plant which was obtained elsewhere?

(Objected to as incompetent, immaterial, and irrelevant, and not cross examination.)

A. I should guess it might be one-third of the whole amount.

Q. Do you mean of the plant and material which was furnished by Hoffman, and the work which he did? McMullen furnished only about one-half of what Hoffman furnished.

A. It certainly could not have been any more than that.

408] Q. You were not taking into calculation the plant furnished by the subcontractors or anything of that sort?

A. There were no subcontractors during the first summer. I am only referring to the plant that was used in the field.

Q. You say you saw McMullen along the line of the works twice in 1893 and once in 1894? A. Yes, sir.

Q. When was it in 1893 that you saw him there?

A. I cannot say, exactly. He came out on the line with Mr. Hoffman; I am not sure whether it was once or twice. He certainly came out once.

Q. Did not you see him there at least once in the fall, along about November or December, in company with Mr. Hoffman?

A. Yes, I saw him in the fall, and I saw him the next summer.

Q. He was there after the 20th of September, 1893, was he not? A. I do not know that I could say, positively.

Q. Do you remember in September, 1893, when it was apprehended that Hoffman would run short of money for the prosecution of the work?

A. The worst time was in August.

Q. You remember when the pinch came? A. Yes, sir.

Q. Now, was it not a long time after that was all over with that McMullen and Hoffman were out on the line and worked together; was it not late in the fall or early in the winter?

A. I think it was after that time. I think that time was in August.

Q. It was after the difficulty about the money, whenever it [409] was, whether August or September?

A. Well, I cannot say, positively; I cannot recollect the exact time.

Q. Let me ask you this question; did you see Mr. McMullen in Portland at any time during the period that this question as to the contingency of money matters was under consideration?

A. I think Mr. McMullen was in San Francisco then.

Q. That was all over with before Mr. McMullen came up, then? A. Yes, I think it was.

Q. And it was after that that McMullen and Hoffman were out on the work together?

A. It was after that that I saw Mr. McMullen in Portland. I will not swear that it was after that that he was out on the line.

Q. What was McMullen doing on the line of the work when you saw him there?

A. He drove out with Mr. Hoffman.

Q. Did they go out and inspect the work?

A. Yes, sir.

Q. McMullen and Hoffman together?

A. Yes, sir.

Q. How long were they there, approximately?

A. They were out and went back the same day.

Q. Spent a good part of the day there?

A. Spent three or four hours.

Q. Now, in 1894 you say McMullen came out alone?

A. Yes, sir.

Q. Hoffman was not with him that time?

A. No, sir.

Q. You never saw him out there with Hoffman again after this time in 1893? A. I do not think so.

10] Q. Hoffman was on the line of the work very frequently, though, during 1893 and 1894?

A. Yes, sir, he came out quite often.

Q. Hoffman also had a number of other enterprises going on at the same time, did he not?

A. Well, he had some things that he gave a little time to. Used to attend directors' meetings once in a while of the Trinidad Asphalt Paving Company, and did some private business.

Q. Did not Mr. Hoffman have some bridge matters after the letting of this contract, and did you not make a number of assessments and attend several bridge lettings for Mr. Hoffman in the Northwest country?

(Objected to as immaterial, and not cross-examination.)

A. I made some estimates, and went to Tacoma with him in the winter of 1893 and 1894, when the work was shut down.

Q. When the work was shut down? A. Yes, sir.

Q. Did not Mr. Hoffman have any contracting work going on at the same time that this Bull Run pipe line was in progress of execution?

A. I do not remember anything that he had.

Q. He was not giving his exclusive time and attention to this contract, was he?

A. I think he was giving most of his time and attention to it.

Q. Most of it? A. Yes, sir.

Q. Well, what proportion would you say?

A. Well, I should say at least three-fourths of his time.

11] Q. Now, Mr. Bush, for what length of time was the work shut down in the winter of 1893 and 1894?

A. I think we shut down out at Lusted's along in January, and we started up at Grant's Butte in March—I should say about six or eight weeks.

Q. What was going on in connection with the work at that time?

A. Nothing was going on then except Mr. Foy's sub-contract work.

Q. Well, Mr. Hoffman was not engaged in superintending the work at that particular time.

A. No, sir, not at that particular time.

Q. And Mr. Hoffman was not engaged in superintending the work between the letting of the contract on the 10th of March and the commencement of the work in June?

A. I think he was then; I think he had a great deal on his mind at that time.

Q. He was preparing for the work? A. Yes, sir.

Q. Was not McMullen doing as much during that time as Hoffman was preparing for the work; I will say McMullen and persons connected with him and acting under his direction?

A. I should not suppose they were doing quite as much; they were not all at the seat of operations.

Q. Do not you know by reason of correspondence carried on with Mr. Catt in New York that Mr. Catt gave a great deal of his time during that three months to the procuring of information, estimates on machinery and things of that sort to be used on this work?

[412] A. I do not know of anything except those punches that I wrote him about.

Q. That was all that you wrote to Catt about?

A. Yes, I think in the same letter I asked him about prices of riveters.

Q. When the work was started up in March, 1894, it run continuously then until it was completed? A. Yes, sir.

Q. Mr. Hoffman went to Chicago three weeks in October, 1893? A. I think it was about that length of time.

Q. He was not engaged in superintending the work during that time? A. No, sir.

Q. What time in 1894 was the work completed?

A. The latter part of November.

Q. How long were you connected with Hoffman after that date, say the first of December?

A. Well, I was in his office, looking over extra bills and things of that sort every Sunday from that time until the first of July.

Q. He was not individually during that period superintending any work in connection with this pipe line?

A. No, sir. We had a man out fixing leaks on the line for some months.

Q. But Hoffman was not giving it his personal attention as superintendent? A. I do not know; I was not here.

Q. I am talking about the time that you were here.

[413] A. When I was here along through the month of November he was out on the line a good deal. I should have said the line was finished on the first of November, but through the month of November I was out on the line fixing leaks.

Q. What I want to get at is this: When did Mr. Hoffman's active superintendence and contribution of his time in whole or largely so towards the conduct of this work cease?

A. Well, I should say his active work might be considered to have extended up to the first of December, 1894; after that he did not have so much to do. Of course, there were a few men out there all the time during the six months that we had to keep the line in repair.

Q. Then I understand that Mr. Hoffman was continuously engaged on the work as superintendent from June, 1893, to October, when he went to the World's Fair, and then upon his return from the World's Fair in October until January, 1894, when the work was shut down, and from January, 1894, to March, when operations were resumed, and then from March until the following December?

A. Yes, that is the time when we had the most to do. From last December on several months we got telegrams almost every day about leaks on the line.

Q. It was during these periods of time that I have enumerated that Hoffman was required to give his time and attention exclusively, or very largely so in your judgment, to this work.

A. Yes, sir.

Q. Now, then, in January, 1895, was it not that Hoffman went to the Sandwich Islands?

A. Well, somewhere in the spring of 1895; I do not remember.

[414] Q. How long was he gone there?

A. I cannot tell you.

Q. As much as three months, was it not?

A. I suppose it was as much as two, I cannot say.

Q. Were you in the office all that time?

A. No, sir; not through the week. I was in the office every Sunday.

Q. Then you would know if you could recall how long he was gone, when he left and when he got back?

A. I would know if I did know; yes, sir.

Q. What is your judgment about the time he was away?

A. I should say that he was away about two months.

Q. After the first of December, 1894, what proportion of Mr. Hoffman's time was required on this contract for the manufacture and laying of steel pipe?

A. After the 1st of December, 1894?

Q. Yes.

A. Well, I cannot say the exact proportion it was, only to say that the pipe was kept in repair.

Q. He had competent men in his employ for that purpose?

A. Yes, he had competent men.

Q. Were they not men who could be relied upon to take care of leaks when they might occur?

A. Yes, sir.

Q. Then it was not necessary that Mr. Hoffman should hold himself in readiness to go up over the line of pipe, or to repair the leaks, or anything of that sort personally?

A. It was not necessary for him to go personally; no, sir.

[415] Q. I understand from the first of January, 1895, the pipes were under a test with the City of Portland, were they not?

A. Well, they were under test, they had been tested several times before that.

Q. But practically the works had been turned over before that time, but they had to be watched during the six months?

A. They were telephoning quite often to Colonel Smith's office to send a man out to different points.

Q. But the work that was required of the contractors after the 1st of January, 1895, was simply to watch the pipe line to see that it did not spring leaks?

A. Yes, sir.

Q. The bulk of the work had been completed and the plant turned over to the city.

A. Yes, sir.

Redirect Examination.

Questions by Mr. MALLORY:

Q. Mr. Bush, do you know whether Mr. Hoffman was a man that smoked?

A. Yes, sir, he smoked sometimes.

Q. Do you know whether he was in the habit of spending some time after his meals before he went to work—did he smoke sometimes?

A. Well, after a meal he generally came into the office with a cigar in his mouth.

Q. While he was smoking he was not actually giving his attention to the superintendence of this work?

A. Sometimes he would.

416] Q. Not always? A. Not always; no, sir.

Q. Now, if you were to take out all the time he spent smoking, how much do you think you would deduct on that account from the time the work was first commenced until its conclusion, can you make an estimate of that?

A. I do not think I can.

Q. Now, Mr. Bush, is it not a fact that the entire responsibility for the conduct and management of that business was on Mr. Hoffman during the whole time?

(Question objected to as leading.)

A. Yes, sir; I think it is.

Q. From the time that he first entered upon the work until it was finally turned over to the city?

A. I think that he felt the responsibility.

Q. Now, in case of any serious break from the time the work was practically completed until the end of the six months what do you say as to the necessity of having some responsible head to look after it, and see that it was put in repair?

(Question objected to as incompetent.)

A. Well, it was necessary to have some competent man to make repairs.

Q. Is it or is it not the fact that in case of any serious break that the damage might be very large and injure Mr. Hoffman very materially? A. Yes, sir.

Q. And that would make it necessary for him to go directly onto the line, and I will ask you whether or not it was not important that some such man should be in easy reach where he could have his attention drawn to it?

(Objected to as incompetent and immaterial.)

[417] A. I think it was important that there should be somebody here to direct the work of fixing leaks.

Q. Since the question of the city's accepting the work depended upon whether the pipes proved sufficient, was it not necessary that he should have some interested man—some man like Mr. Hoffman—concerned in it, to superintend and have general control over it

A. I think it was necessary to have somebody that represented him.

Q. I understood you to say that there were three estimates, or three chief estimates, made by three different engineers?

A. Yes, sir.

Q. Now, who were those three engineers?

A. Mr. Wood, of the San Francisco office of Mr. McMullen, Mr. Catt of the New York office, and myself.

Q. Now, sir, your estimate was first upon the cost of the work, I understand; how nearly did those three estimates agree?

A. We agreed almost exactly; we agreed within \$1.00 per ton.

Q. So the want of knowledge on the part of the particular engineer, would that or would it not have been a material element in the figuring?

A. Want of knowledge?

Q. The want of knowledge of the construction of the country, and the particular character of the ground, etc., was that essential in making the figures, or would the figures based upon the estimate made by the water committee indicate the kind of work that they had to have done?

[418] (Objected to as immaterial and incompetent.)

A. I think that want of knowledge of the precise location would only affect the result of the engineer's calculations to a small extent.

Q. Now, let me ask you if the water committee furnished any data of the amount and kind of work that they wanted done?

A. They furnished an estimate on which the engineer's were based of the quantities of each item.

Q. And it was upon that estimate that the engineer made his figures?

A. Yes, sir; the engineer just simply added his price to those figures.

Q. He made his estimate of the cost of doing the work that was specified in the water committee's invitation for bids?

A. Yes, sir.

Q. So that Mr. Catt's want of any actual knowledge of the situation, and Mr. Wood's actual want of knowledge of the situation and of the character of the material to be handled from an inspection of it, yet their bids and yours for the cost of the work were identical, were they? A. Yes, sir.

Q. Now, when Mr. McMullen came in in a somewhat excited state of mind about an hour before the bids were submitted and insisted upon the bids being reduced, what reason did he give, if any?

A. Well, that he had sized up some of the other bids.

Q. Did he say whose? A. Yes, Mr. Wakefield's.

Q. What did he say?

A. He said, "We have to come down or we won't get the job."

Q. That is the reason why it was reduced,

[419] A. Yes, sir.

Q. Now, the total estimate of the cost and profit made by yourself and by Mr. Catt only differed about \$5,000.00, I understand? A. Yes, sir.

Q. Now, how did you come to get this \$465,000, or \$479,000, that you finally agreed upon?

A. Well, that was got by adding about \$10 per ton to the first item in the bid,—that is so much per ton—so many pounds of plates and rivets, raised that from 2½ cents per pound to 2¾ cents per pound.

Q. Was that in the way of cost or profit?

A. That was in the way of profit.

Q. In figuring when you had ascertained the cost it did not require any very nice figuring to determine the amount of profit?

A. Well, it was not a question of figuring; it was a question of judgment.

Q. You came to the conclusion that by reducing the amount about \$13,000 you could get below Wakefield?

A. Yes, sir.

Q. So you reduced your amount \$13,000 by taking that amount off the excavating? A. Yes, sir.

Q. That reduced the cost of excavating really 5 cents below what you thought it could be done for?

A. Below what I thought it ought to bring.

Q. Below what you thought it ought to be done for?

A. Yes, sir.

Q. Now, this difference referred to in Mr. Catt's bid in regard to manholes—his bid was \$7,560 and your bid was \$4,500—I will ask you whether you made your estimate before you had seen Catt's estimate or afterwards?

[420] A. It was before.

Q. How was it with the concrete? There was \$700.00 on the items of concrete in Catt's estimate and yours was \$600.00. Was your estimate on that item made before or after you saw Catt's?

A. I think all the items I had made before I saw Mr. Catt's estimate except the one for bricks laid in cement—that item I put down just as Mr. Hoffman gave it to me.

Q. Your estimate for excavating was more than Mr. Catt's originally? A. A trifle more; yes, sir.

Q. Some \$4,500 more? A. Yes, sir.

Q. Now, do you recollect at that time, Mr. Bush, any matter that was communicated to you, either by Mr. McMullen or Mr. Hoffman, as having been received after this bid or this estimate of yours was made which induced you to change your figures in any respect?

(Objected to as immaterial and incompetent.)

A. No, sir.

Q. Your attention has been called to some letters here—a letter of February 22d, 1893—does that letter refer to the manufacture and laying of the pipes, or does it refer to the steel plates? There is a reference in the letter to valves, \$25 for freight and \$25 for laying.

A. Well, those valves we got from Goldsmith & Lowenberg, so we did not pay any attention to that particular item.

Q. I was going to ask you whether those valves, the cost of freight and the cost of laying, had anything to do with the making up the bid as finally put in by Hoffman & Bates?

A. No, sir.

21] Q. If Mr. Lockwood did any figuring on this matter at all, to what part of the work was his figuring directed?

A. I do not think Mr. Lockwood did any figuring to amount to anything. He simply filled out Mr. McMullen's bid.

Q. Now where was he when he filled out that bid?

A. In Mr. Hoffman's office.

Q. How were the figures on that bid arranged and by whom?

(Objected to as not proper re-direct examination.)

A. Well, the figures in Mr. McMullen's bid for manufacturing and laying were not particularly agreed upon by anybody. It was agreed that it should be a high bid, and it was simply filled in to make it high. It was not agreed upon to be any particular amount.

Q. Well, the other items for steel plates and bridges?

(Objected to as incompetent, immaterial and irrelevant, and not proper re-direct examination.)

A. The steel plates that was agreed upon.

Q. That was to be lower?

(Objected to as incompetent, immaterial and irrelevant, and not proper redirect examination.)

A. It was to be lower than Mr. Hoffman's bid.

Q. That was agreed upon between Mr. Hoffman and Mr. McMullen?

A. Yes, sir.

Q. Do you remember about the other items of bridges and head works?

(Objected to as incompetent, immaterial and irrelevant, and not proper redirect examination.)

422] A. It was agreed that the San Francisco Bridge Company's bid on bridges should be lower. The other things did not amount to so very much.

Q. After Mr. McMullen came here from San Francisco, and between the time of his arrival here and the time the bid which was agreed upon between him and Mr. Hoffman was submitted to the water committee, were you in receipt of any information requiring a change of any sort in the estimates upon which that bid was based?

A. No, sir; they were not in receipt of anything that required any change. Mr. McMullen brought his telegrams in to me, but I did not see anything that made any particular change necessary.

Q. Now, were any changes made on account of any such information that you know of?

A. Nothing that I know of.

Q. If any such change had been made you would have known it? A. Yes, sir.

Q. You had charge of the preparation of the bid itself, had you not?

A. Yes, sir; I did all the figuring on the bid itself.

Q. And it was filled out by you? A. Yes, sir.

Q. And you were consulted about it when any change was made? A. Yes, sir.

Q. Now, I understand you to say that since a reduction of the total of the estimate was to be made from the amount of profits that it did not require any nice calculation to determine how it should be done, or how the deduction should be made? A. No, sir.

Q. Did Mr. McMullen indicate when he came in, as you spoke of, how much reduction must be made?

[423] A. I think he indicated we were to make about the amount we did make.

Q. Did he suggest anything from what particular item in the bid it could be taken from, or was that left to your judgment?

A. As I remember it, they asked me where was the easiest place to take it off, and I took it off the earth work.

Q. During the time between the letting of the contract by the city to Hoffman and the beginning of the work on the line in June, what was Mr. Hoffman doing?

A. Well, he was principally punching up Wolff & Zwicker to get the shop ready, and punching me up to get tools ready here in town.

Q. Was he giving his whole attention to it or not?

A. Well, he was giving a good deal of his attention to it.

Q. As much attention as a person having it in charge could do? A. Yes, sir.

Q. What was Mr. Hoffman doing, if you know, during the time the work shut down from January to March?

A. Well, that is the time he and I went over to Tacoma.

Q. How long were you gone?

A. A couple of days at a time.

Recross-Examination.

Questions by Mr. L. B. COX:

Q. Did Mr. Hoffman charge up against this work the cigars that counsel has called your attention to his smoking?

424] A. Not that I know of.

Q. Do you know any other bad habits that Mr. Hoffman had?

A. Well, I do not know about any bad habits.

Q. How much of his time was given to habits that you would not approve of during the time that this work was going on?

A. Oh, well, I will say that he had no habits that I would not approve of.

Q. You say, Mr. Bush, that after this work had been practically completed and turned over to the city, and while it was under this six months' probation to determine the condition in regard to the pipes as to leaks and breaks, it was necessary to have some competent man present to exercise superintendence over the work? A. Yes, sir.

Q. And it was during that time that Mr. Hoffman went off to the Sandwich Islands and left it? A. Yes, sir.

Q. Had he the services of a man competent to discharge work of that character?

(Question objected to as incompetent, immaterial and irrelevant, and not proper recross-examination.)

A. Well, I think he paid a man \$150.00 a month. The man was in the field.

Q. Now, there was no difference in the condition of things, was there, during so much of the six months as Mr. Hoffman was in the Sandwich Islands and the remainder of the six months?

A. Well, at the time Mr. Hoffman went to the Sandwich
[425] Islands he had reason to believe the leaks were pretty well fixed.

Q. Was there any difference in the condition of the pipe in regard to putting it under the charge of some other person during those two months than there was during the other four months?

A. I think there was some difference in the two months preceding that. I think in the months of December and Janu-

ary—December particularly—there was a good deal to see to. It was after that that Mr. Hoffman went away, but after that I do not think there so much.

Q. Now, then, if Mr. Hoffman could leave the pipe and go to the Sandwich Islands as he did do for two months, could he not have done the same thing and put it in charge of some man whose services might have been procured for \$150.00 a month, and who would have been competent to look out for the pipe during the whole of the six months after the first of January?

(Objected to as incompetent, irrelevant and immaterial, and not recross-examination.)

A. I think it was important for Mr. Hoffman to be here at the first of the time and near the close of the time, near the time of the acceptance of the work by the city.

Q. That is, the first of July. A. Yes, sir.

Q. But it was not important other times?

Mr. MALLORY. He did not say that.

A. It was not of so much importance other times?

Q. Now, Mr. Bush, you say that such differences in conditions as might have actually existed here, and as they were [426] presented to a man situated as Mr. Catt was in making an estimate on this work, would have made slight changes in the result?

A. Well, what I would say is this: That both Mr. Catt and Mr. Wood were pretty familiar with this country and they knew pretty well what the conditions really were, and they had to make a pretty close estimate on that account.

Q. Now, I refer to the conditions as they appeared to Mr. Catt, whatever his information may have been?

A. Well, his information was a great deal more accurate than if he had never lived down here, because Mr. Catt has lived here.

Q. Where did Mr. Catt live?

A. He lived in Seattle.

Q. Do you know of any single time that Mr. Catt was ever in the city of Portland?

A. Well, he was not in Portland when I was here.

Q. He was in Seattle when you were here?

A. No, sir.

Q. How do you know he was in Seattle?

A. I have heard people speak of his being there.

Q. How long did you understand that he lived in Seattle?

A. Several years.

Q. What was he doing?

A. Representing the San Francisco Bridge Company in that district.

Q. Now, is it not a fact that when this work was actually commenced it was found that even you, who had been over the ground, had not been very well advised as to the conditions as they subsequently turned out?

A. About the soil?

27] Q. Yes, particularly.

A. Yes, we found the excavation much harder than we expected.

Q. You say that the estimates made by yourself and Mr. Wood and Mr. Catt were practically identical; was not that only on the cost of manufacturing the pipe?

A. Yes.

Q. And not on the other matters?

A. No, sir; not on the other matters.

Q. You say that these differences between the Catt estimate and your estimate you have referred to existed before you saw Catt's estimate; that is, your figures were made up independent of his? A. Yes, sir.

Q. I understood you to say in your cross-examination in the first place that you took Catt's figures and changed them so that they appeared in contrast with the figures that you had sent down?

A. I think I did not say that.

Q. If you did say it you did not intend to be understood that way?

A. I did not intend to be understood that way; no, sir.

Q. Are those figures which you have scheduled on this paper in contrast with Catt's figures, the figures that you had made up before you ever saw Catt's estimate?

A. For the minor items, they are.

Q. How are they for the larger items?

A. For the one large item the price was raised \$10.00 per ton over my original price.

Q. And the item you cut was the earth excavation?

A. Yes, sir.

[428] Q. Do you say that the other were figures that you had got before you ever saw anything that Catt had made?

A. I think they were. I think we looked up these things and got a price on all the valves and things of that sort. I know that my figure for the bends was made up before I saw his.

Q. You figure on the bends? A. Yes, sir.

Q. And your figure was widely out of the way in regard to bends—you found a great many more bends than you calculated?

A. I reported that fact when I came back over the line.

Q. You found a great many more bends than you estimated?

A. Yes, sir; Mr. Smith thought there would be 200 of those bends; I think I estimated about 1,000, and the actual number was 730.

Q. You say that nothing reached you in the way of information during the time you were figuring on these estimates affecting in any degree the calculations that you were making, is that the fact?

A. Yes, sir; I think that is the fact.

Q. What is the significance of these figures which you say were made on this telegram addressed to McMullen by Catt, which was marked, "For identification No. 4"?

A. Those figures are hundredths cents per pound, but they referred to having the plates punched, planed and scarfed back east, but we paid no attention to that because we decided to do all the work here.

Q. Did not you make use of those figures in determining whether you had best do the work back there or here?

[429] A. No, sir, we gave up all idea of doing the work east.

Q. Before you made that? A. Yes.

Q. Notwithstanding that you took the trouble to carry out that estimate to see what it amounted to?

A. Yes, I took the trouble to compare it with the estimate that I had some time before from other parties.

[Signed]

HARRY D. BUSH.

Thereupon the taking of testimony herein is adjourned until January 23rd, 1896, at 10 o'clock A. M.

[Signed]

GEO. A. BRODIE.

Office of G. A. Brodie, U. S. Examiner, Portland, Oregon,
January 23, 1896, 10 O'clock, A. M.

At this time appear the parties herein, the complainant appearing by Mr. L. B. Cox, of counsel, and the defendant appearing by Mr. Rufus Mallory, of counsel, and thereupon the following proceedings are had, to wit:

H. C. CAMPBELL is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by MR. MALLORY:

Q. Mr. Campbell, state your name, age, residence, and
430] occupation?

A. H. C. Campbell; age, 41 years; residence, Portland, Oregon; manager of the City & Suburban Railway Company.

Q. Are you interested in the Pacific Bridge Company?

A. Yes, sir.

Q. What business is that company engaged in?

A. General contracting.

Q. How long have you been engaged in the business of general contractor, in connection with the Pacific Bridge Company?

A. I came here in 1886, and I have been with them since 1886.

Q. You say you are manager of the City & Suburban Railway Co.—did you, during the time that you have been such manager, have anything to do with the contracting business connected with the Pacific Bridge Company?

A. Yes, we kept both concerns together.

Q. Did you know Lee Hoffman in his lifetime?

A. Yes, sir.

Q. Are you acquainted with Mr. McMullen?

A. Yes, sir.

Q. Were you acquainted with the circumstance of the letting of the work of constructing the pipe line for conveying water from Bull Run to Portland?

A. Well, to a certain extent I am.

Q. Ever been over the line? A. Not wholly.

Q. Were you a bidder for any part of the work at the time of the letting by the water committee?

(Objected to as irrelevant.)

A. Yes, sir.

[431] Q. Were you acquainted with the nature and character of the work to be done in the matter of manufacturing and laying the pipe from Bull Run to Mount Tabor?

(Same objection.)

A. Yes, sir.

Q. Did you know of the contract having been let to Hoffman & Bates?

A. Yes, sir.

Q. Are you acquainted with the business that one would be required to perform who had that contract—what the work of superintending and managing—do you know what it would be worth?

A. Well, I think so, Mr. Mallory.

Q. Supposing a man having that contract amounting to some \$46,500.00, having to execute a bond for its performance to the amount of \$140,000.00, required to furnish money for a plant to carry on the work, amounting to \$15,000.00, or \$20,000.00, had to provide the means for carrying on the work in the way of tools, and the best plan for conducting it, and having general superintendence of it—what do you say it would be worth per month for a man to do that sort of business?

(Counsel for the complainant objects to the question on the ground that it assumes an incomplete state of facts as shown by the evidence.)

A. Well, it would be a very valuable position, and responsible one, to find a man to take hold of it and do it; should think it would be a liberal salary.

Q. How much?

A. It would be a very liberal salary for a man to take that responsibility.

[432] Q. What sum would you say would be a reasonable salary for that work?

A. I should think that a man ought to have one thousand or twelve hundred a month.

Q. Mr. Campbell, in the conduct of such business as that, is it expected or usual that the superintendent will apply every hour of his time directly to the work?

(Objected to as incompetent.)

A. Well, do you mean to be out on the work?

Q. Yes, sir.

A. Well, not in a business of that kind.

Q. What is the chief value of the services of a man in such a position?

A. Well, to plan the work, and see that it is carried out, to secure good men to work in the different departments, and to look out for the financial end of it.

Q. Where the party himself furnishes a large share of the money to start the work, which requires, say, \$15,000.00, would that enhance the value of his services at all?

(Counsel for complainant objects to the question on the ground that it is based upon an incomplete statement of the facts.)

A. It most assuredly would.

Q. Do you know anything of Mr. Hoffman having gone to the Sandwich Islands in 1895?

A. Yes, sir.

Q. Do you know when he went there?

A. Yes, sir. I went over there, left San Francisco on the 9th of February; we were to sail on the 7th, but the ship was two days late in leaving, and I arrived in Honolulu seven days after that, and Mr. Hoffman and wife came in two days after I arrived.

Q. You arrived on the 9th?

33] A. No, I left San Francisco on the 9th, and arrived in Honolulu on the 16th, and Mr. Hoffman and his wife came in two days later.

Q. They came in on the 18th, then? A. Yes, sir.

Q. Do you know how long he remained there?

A. Well, about two months; I was there five weeks, and he was there two or three weeks longer.

Q. Do you mean he was there five weeks, or how long was he gone from Portland?

A. I arrived in Portland on the first of April, I think, and he came back about the middle of April; I think he was probably two weeks behind me, may be three, but not over that?

Q. Did you ever have any conversation with Mr. McMullen in regard to the letting of this contract for the manufacture and laying of the pipe from Bull Run to Mount Tabor?

A. No, sir; Mr. Hoffman and I never discussed the matter. I don't remember of our discussing it at all.

Q. I will ask you if you ever had any conversation with Mr. Hoffman about it?

A. Yes, I have often talked with Hoffman about it.

Q. When was the last conversation that you had with him?

A. The last conversation I had with Hoffman was when we were in Honolulu.

Q. Would you state what that conversation was?

(Objected to as incompetent.)

A. I asked Lee—

Q. Who do you mean by "Lee"?

[434] A. Mr. Hoffman; we always called him Lee; I asked him what Mac. was going to do—I always spoke of Mr. McMullen as Mac.—and Mr. Hoffman said, "I suppose he will sue me"; I said, "Suppose he does," and Lee says, "Well, if he does, I am afraid it will bring out the fact that we pooled that job." I said, "I don't see as you need to take that very seriously"; I said all our merchants and bankers do that kind of business—that business is transacted by pools and trusts—and Lee said he did not care for that, it would show that there was collusion, and it was against public policy, and he said he was afraid he had some neighbors who would not understand that kind of transaction; always talked about that particular point of the case; and I was trying to cheer him up, and he made that remark to me in regard to the matter.

Q. Did he at that time, or not, give you any details of how the matter was arranged between them, or did he speak about it only generally?

(Same objection.)

A. No, he did not go into details.

Q. When you speak of "Lee" and "Mac," to whom do you refer?

A. I refer to Mr. Hoffman and Mr. McMullen.

Q. Plaintiff and defendant in this suit?

A. Yes, sir.

Q. When he was talking to you about the manner in which that contract was obtained, what contract did he refer to?

(Same objection.)

A. The contract for the Bull Run water pipe.

Q. For the manufacture and laying of the pipe?

(Same objection.)

435] A. Yes, sir.

Q. The contract that he had with the city?

(Same objection.)

A. The contract which he had and carried out.

Cross-Examination.

Questions by MR. L. B. COX:

Q. Mr. Campbell, you say on the hypothesis which was submitted to you by counsel for defendant you think a proper salary for a superintendent of the work which was done in manufacturing and laying the steel pipe on this water line would be a thousand or twelve hundred dollars per month; now, I will ask you this question: Suppose that on the 6th day of March, 1893, Hoffman & McMullen went into partnership to manufacture and lay the pipe from the head works on Bull Run to Mount Tabor, and that it was agreed that Hoffman should be the active superintendent; that both men were to contribute equally to what was needed in the way of capital and material to carry on the work; that each was to contribute his services in his sphere—Hoffman here, McMullen in San Francisco—and the work was not to commence until June following; that McMullen in San Francisco, was engaged whenever he was called upon between the 6th of March and the 20th of September, 1893, in assisting at his end of the line, and through the New York office of the San Francisco Bridge Company which he controlled, in getting ready for the work and prosecuting it, after it was started by procuring information in regard to the best manner of conducting the work by looking up and supplying men in the position of superintendent and in minor positions, getting such tools as McMullen was called upon to look after and secure for the work; that he contributed plant and material to the value of between \$1,700 and \$2,800, being about one-third of the total amount which was provided during that time; that he did not supply any money beyond that; that Hoffman made advances to the enterprise between June and September aggregating some \$15,000, all of which was returned to him on the 20th of September, and he thereafter had no further money in the enterprise; that Hoffman giving his personal attention to the work as had been agreed upon between him and McMullen during the months which I have alluded

[436]

to from March until September 20th to the full extent that his personal attention was required, but that he was also engaged during the same time in carrying forward his individual business outside of this contract; that he and McMullen were partners in — what, then, would you say, under those circumstances, would be a proper allowance to be made Hoffman for the work he was doing as against the work which McMullen was doing—for Hoffman's services to be charged against the job? I will say also that Hoffman got the bond which he was required to give, that should be added to my question.

(Counsel for defendant objects to the question, for the reason that it is not a correct assumption of the facts proven in the case.)

[437] A. Knowing all these circumstances quite thoroughly I considered it upon the basis that if I was a partner of Mr. Hoffman, and he done the work he did do, I would not have regarded \$1,500 a month as too much of a salary to pay him.

Q. You think \$1,500 a month during the months that I called your attention to?

A. No, from the time this work was started.

Q. Please answer my question, directing your attention to the time between the 6th of March and the 20th of September, 1893, the first year; I will ask your opinion based upon the facts I have submitted to you.

A. Well, there was a great deal of work to be done that was the responsible part of it.

Q. What was your judgment based upon the facts during that time?

A. I think he should be well paid, Mr. Cox, for his services.

Q. What would you say?

A. I would not begrudge a thousand dollars a month, I am sure.

Q. Suppose McMullen had done nothing during that time, what would have been a reasonable compensation to Hoffman if he had done everything?

A. I have not a very great appreciation of the services of Mr. McMullen on this job.

Q. You are not called upon, Mr. Campbell, to give an opinion upon the basis of your opinion, but from the facts as stated to you.

A. Mr. McMullen should be paid for what he did, no matter what it amounted to. If he furnished \$1,800 of machinery for
[438] such a plant as that, he ought to be paid; he ought to be paid for such service as that what it would be worth.

Q. Is it not a fact that the estimate you have given upon the value of Mr. McMullen's services is based upon your own idea of what each man did?

A. On my own idea?

Q. Yes.

A. It would be based on my opinion of what they did, yes.

Q. Now, is it not a fact that you are making that allowance to Mr. Hoffman on the assumption that Mr. McMullen threw on Mr. Hoffman the burden of carrying the whole thing through, and rendered him no aid?

A. Well, that is the way I look at it; very little aid was rendered.

Q. Now, then, if it be a fact that during the period of time between the 6th of March and the 20th of September, 1893, the first year that this work was set on foot, Mr. McMullen did everything that he was required to do, both individually and through certain employees of the San Francisco Bridge Company, at San Francisco, whose services were directed at the instance of McMullen, and also other like persons in the city of New York—did everything that he was required to do, or was called upon to do, up to the 20th of September, and at that time the only grievance made against him was that he had not furnished as much money toward the job as Hoffman had furnished, and Hoffman used that as a means of attempting to exclude McMullen from the partnership at that time, and assumed to take it upon himself after that time to run it to its
[439] conclusion—what would you say was the reasonable compensation to be allowed Hoffman for the entire time that he had the job in hand over and above what McMullen had done and was willing to do?

A. Well, Mr. Hoffman had full management of it, but don't know what McMullen did; you say he did services in New York?

Q. The fact is, Mr. Campbell, you are rendering your opinion on what you know or believe that Hoffman did without any information as to what McMullen did as an offset to Hoffman's attending to the work?

A. I think Mr. Hoffman was worth that much anyhow, whatever McMullen did; think McMullen could well afford to pay him that much regardless of anything that McMullen may have done.

Q. Regardless of anything McMullen may have done?

A. Yes, sir.

Q. Now, what you know about this matter, Mr. Campbell, is what you have learned from Hoffman, is it not?

A. A good deal of knowledge comes from him; yes, sir.

Q. What do you know about it at all as to what McMullen did and what Hoffman did, except what Hoffman told you?

A. I saw the work that was being carried on.

Q. Saw Hoffman as active superintendent?

A. I have been out that way over the work two or three times, and I know how the work was carried on, to a certain extent. I am quite well posted.

Q. But your knowledge as to what McMullen did, or what he did not do, you gathered from Hoffman?

A. You might say that; there would be no other way to gather it.

[440] Q. Mr. Hoffman talked with you frequently about this matter, did not he? A. Yes, sir.

Q. Gave you his side of the grievance between himself and McMullen? A. Yes, sir.

Q. And you formed an opinion in regard to these topics concerning which you have been giving testimony from this information communicated to you by Hoffman?

A. Principally.

Q. You and Mr. Hoffman were very close friends, were you not? A. Always very good friends.

Q. And he communicated very freely with you in regard to this matter?

A. We have often talked it over; yes, sir.

Q. Mr. Hoffman, when he went to Honolulu, was engaged in business enterprises of his own, was he not, at Honolulu?

A. No, sir, he had no business at Honolulu except a pleasure trip.

Q. Was not Hoffman figuring over there in regard to some railway scheme?

A. No, sir, he knew nothing about it; he was there; there

was a railway scheme, but Mr. Hoffman knew nothing about it when he landed.

Q. Did he take any interest in it?

A. Took no personal interest in it.

Q. Had nothing to do with it?

A. None whatever, he looked the matter over, did not want to engage in any business any further; he was in position to have done so and made a good thing out of it, but he desired to [441] take it easy for some time, and declined to take an interest in it; he was there purely on pleasure.

Redirect-Examination.

Questions by MR. R. MALLORY:

Q. Mr. Campbell, I will just ask you a question; suppose Mr. Hoffman to be on the ground and in charge of this work, now suppose that Mr. McMullen at the instance of Mr. Hoffman had caused to be ordered a hydraulic punch and shears in New York, and suppose he had recommended to Mr. Hoffman a foreman or superintendent for the work, and suppose he had, at the request of Mr. Hoffman, ordered in San Francisco some portable forges; now, how much would that kind of service on the part of McMullen, in your opinion, reduce the value of Mr. Hoffman's services as general superintendent and manager and having control and being responsible for this work?

(Counsel for complainant objects to the question, on the ground that it is not rebutting testimony, and on the further ground that it is based upon an incomplete statement of the facts.)

A. Well, that would be acting in the capacity of a purchasing agent, and his compensation would be a small commission on the amount of the purchase price of the goods.

Q. Just answer the question whether it would in any way reduce the value of Mr. Hoffman's services as manager.

(Same objection.)

A. Not at all.

Witness excused.

[442] A. DONNELL is called as a witness for the defendant, and having heretofore been duly sworn, testified as follows:

Direct Examination.

Questions by MR. R. MALLORY:

Q. Mr. Donnell, I show you a paper marked in red ink at the top "Copy of San Francisco Bridge Co. 8, estimate"; then in the line below in black ink, "Portland Water Works, Bid A," and also a sheet marked "Copy from San Francisco Br. Co., Estimate," in red ink; then in black ink, "Portland Water Works, Bid C Continued"; I show you both sheets and ask you to state, if you know, what they are and if you have seen them before.

A. I have seen them before.

Q. Did you ever see the originals before?

A. Yes, sir.

Q. Do you know how they came into your possession, if they ever were in your possession or under your control?

A. Well, I do not know as they were exactly in my possession; they were handed to me to be copied.

Q. Do you know by whom?

A. I cannot remember just now.

Q. How, if you know, did the originals of those papers come into your office?

A. How they came to the office in the first I am unable to state.

[443] Q. I will ask you if you know of their being at any time in the possession of Mr. McMullen? A. Yes, sir.

Q. When and where?

A. Well, I do not remember the particular date. It was about March, 1893.

Q. Before or after the letting of the contract to construct and lay the pipes to convey Bull Run water to Mount Tabor?

A. Before.

Q. How long before?

A. I cannot say—some weeks, one or more weeks.

Q. When did you first see them, if you remember?

A. About the same time—about March, 1893.

Q. That you first saw them?

A. Yes, sir; I first saw them about that time.

Q. Do you know whether or not Mr. McMullen about that time brought any papers to the office?

A. No, I do not know.

Q. You do not know? A. I do not know positively.

Q. Did you see any of those papers?

A. Any of these papers—the originals?

Q. Yes. A. Yes, I saw them.

Q. Now, had you any conversation with Mr. McMullen about his having brought these papers with him from San Francisco—the originals of those papers?

A. None that I remember of.

Q. I will ask you now if you still have in your possession the original from which that was copied?

A. No, I have not.

Q. State what was done with it, if you know.

A. It was either taken back or sent back to San Francisco to the office of the San Francisco Bridge Company.

[444] Q. It was taken back by whom?

A. By Mr. McMullen.

Q. I will ask you now if you made this copy yourself?

A. Yes, sir, I made it.

Q. This is a copy of the original that you were furnished in your office purporting to be the estimate of the San Francisco Bridge Co.?

A. Well, barring any errors—yes.

Q. How is that?

A. Well, barring any errors there might be.

Q. Well, do you know of any errors?

A. None that I know of.

Q. Your intention was to copy it correctly, was it not?

A. Yes, sir.

Q. What is your present recollection as to whether you copied it correctly or not?

A. Well, I think I checked it.

Q. And if you checked it you compared it?

A. I must have compared it and found it correct before I delivered it.

Q. Did you have anything to do with the making of the estimates or preparing the bids for the work of constructing the waterworks for bringing Bull Run water to Portland in the office of Mr. Hoffman—in the work of preparing the bids in the office?

A. Yes, sir.

Q. What did you have to do?

A. I helped make the final copies of them to be presented to the water committee.

Q. Did you or not have anything to do with the figuring—with the calculation—was that part of your duty, or was that done by the engineer?

[445] A. I did a small portion of it in the matter of checking calculations, additions, etc.

Q. Simply formal mathematical works, figuring and that sort? A. Yes, sir.

Q. Did you hear any conversation between Mr. Hoffman and Mr. McMullen about the bids?

A. Well, I heard them talking in a general way about it at various times.

Q. Is there anything that you specifically remember about it at this time—about the method of bidding or anything of that kind? A. No, nothing.

Q. Simply heard general talk about it?

A. Just general talk.

(Counsel for defendant offers in evidence the papers last shown the witness, but states that as they were not offered when Mr. Bush was on the stand he will call Mr. Bush if they are objected to on that ground. Counsel for complainant makes no objection to the offer of the papers because not offered when Mr. Bush was on the stand, but objects to their introduction on the ground that they are immaterial, and because no proper foundation has been laid for their introduction as copies in lieu of the originals. The papers referred to are received and filed, marked "Defendant's Exhibit U2, V2, W2, W2, page 2, and W2, page 3.")

[446] *Mr. Mallory.* I will identify the second paper consisting of three sheets more fully; it is marked "Bull Run, Copy of Catt's Estimate on Plant," signed at the bottom with the initials "H. D. B.," this is the paper marked "Exhibit W2" above. The second sheet is marked "Bull Run," with the initials "H. D. B." at the bottom; this paper is marked "Exhibit W2, page 2" above, and the third sheet is marked "Copy of Catt's Estimate for Manufacturing and Laying," and is the paper marked "Defendant's Exhibit W2, page 3," above. I offer these papers in evidence, reserving the right to explain the pencil figuring on the last sheet.

Q. Up to what time, if you know, did Mr. Hoffman make a charge as salary as superintendent of this work?

A. Up to January 1st, 1895.

Q. Do you know when Mr. Hoffman went to the Sandwich Islands? A. Yes, sir.

Q. When did he go?

A. He left Portland on February 9, 1895.

Q. And returned when? A. About April 3rd.

Q. Gone a little less than two months?

A. About two months I think he was gone.

Q. Do you know about his having visited Yellowstone Park? A. Yes, sir.

Q. When was that?

A. He left Portland on the 24th of June, 1895.

Q. Was gone about how long, do you know?

A. About two weeks.

Q. Did he return before the 1st of July, or do you remember?

A. I do not remember; I do not think he did.

Q. Upon what day was it that Mr. Hoffman was killed?

A. On July 21, 1895.

Q. Was it Sunday? A. Yes, sir, Sunday.

Q. What do you know about Mr. Hoffman having gone to Chicago in 1893.

[447] A. Yes, I think he went to Chicago in 1893—the latter part of 1893.

Q. How long was he gone, do you know?

A. He was gone about two weeks.

Q. I will ask you if you know anything about his making any arrangement about funds to meet payments which would fall due about the 20th of September, 1893?

(Objected to as immaterial and question withdrawn.)

Q. I will ask you another question: What do you know, if anything, about Mr. Hoffman calling upon Mr. McMullen for funds about the middle of August, 1893, or September?

(Objected to as incompetent and immaterial.)

A. Yes, I know, Judge.

Q. I will ask you whether you have any knowledge of his having made any arrangement for providing the money in case Mr. McMullen did not advance the money as requested?

(Same objection.)

A. I do not know about any special arrangements.

Q. Do you know Mr. Hugh Foy? A. Yes, sir.

Q. In what capacity, if at all, was he employed about the works for the execution of the contract with the city?

A. He was employed as superintendent in the field of all work under Mr. Hoffman's contract.

Q. About when did he commence and about when did he cease?

A. He commenced work about June 1st, 1893, and ceased work about the end of the year—about the end of that same year.

[448] Q. About the first of January?

A. Yes, I think so—about the latter part of 1893, some time.

Q. What do you know about his having had a contract from Mr. Hoffman to do some work of excavating on this ditch line?

A. He had a subcontract from Mr. Hoffman for excavating certain portions of the work.

Q. When he was performing that contract he had ceased to be superintendent of the work, had he not?

A. Yes, sir.

Q. What do you know about a plant that was brought over from Seattle—sent over by the San Francisco Bridge Co.? Explain what you know about that.

A. Well, there was quite a bit of plant shipped over to Portland from Seattle by the San Francisco Bridge Co., and charged it to Hoffman & Bates, consisting of wheel scrapers and various other tools; also a number of horses that was sent over for them to be used on the Bull Run pipe line.

Q. What, if anything, was said, if you know, between Hoffman and McMullen about the price of the plant; what should be allowed for it?

A. I do not know that there was anything said until after the plant had been shipped here—

(Complainant objects to this testimony as immaterial and incompetent.)

A. (Continued.) After the plant was shipped here a bill was received at the office. Mr. Hoffman thought it somewhat exorbitant for the sort of material that it consisted of, and wrote either to the San Francisco Bridge Co. at Seattle or to

9] Mr. McMullen at San Francisco, and shortly after that Mr. McMullen wrote and told Mr. Hoffman—

(Counsel for complainant objects to the witness stating contents of these letters as not the best evidence.)

Q. Go on.

A. That whatever price suited him would be agreeable to both sides.

Q. Whatever suited Hoffman would be agreeable to McMullen? A. Yes, sir.

Q. Have you any recollection what that price was?

A. Yes, sir; it was about \$2,300.00.

Q. Was the item carried into the books of Hoffman & Bates?

A. Yes, sir; it was credited to the San Francisco Bridge Co. on the books.

Q. It will be found there?

A. Yes, sir; it is found on the books.

Q. What, if anything, do you know of Hoffman & Bates offering to pay the San Francisco Bridge Co. for the plant?

(Objected to as immaterial.)

A. Yes, there was a remittance made to cover the account.

Q. Was it accepted or returned?

(Same objection and as incompetent.)

A. It was in the form of a draft which was returned.

Q. Not accepted? A. Not accepted.

450]

Cross-Examination.

Questions by MR. L. B. COX:

Q. Mr. Donnell, do you remember the circumstance of a breach occurring between Mr. Hoffman and Mr. McMullen in September, 1893, on account of McMullen not furnishing Hoffman with certain moneys that he demanded of him?

A. Well, I remember a breach occurring, but I do not remember the particular time or in what month it did occur.

Q. Now, was it not after this time that this tender for the plant was made to the San Francisco Bridge Co.?

A. Well, as I do not remember just the time the breach occurred I cannot say.

Q. Assuming that it was in September, 1893, what would you say?

A. Yes, it was after that time.

Q. It was considerably after that, was it not?

A. I think so.

Q. Do you remember what the value of the plant was that had been contributed by Mr. Hoffman prior to September 20th, 1893, in comparison with that which had been contributed by McMullen?

(Objected to as irrelevant and immaterial.)

A. I do not know how it compared at that time.

Q. Can you remember whether it was materially larger?

(Same objection.)

A. Do you mean at that time or on the whole work?

[451] Q. No, I mean prior to September 20th, 1893.

A. No, sir; I do not remember how it compared at that time.

Q. The books will show that, will they not?

A. Yes, the books will show that.

Q. Do you remember the fact of the work being shut down during the winter of 1893-4? A. Yes, sir.

Q. What length of time were they shut down?

A. Well, it was never entirely shut down. The bulk of the work was shut down. The amount of the work was reduced, it was never entirely shut down.

Q. It was very largely reduced, was it not?

A. Yes, sir.

Q. Practically shut down in comparison with the entire job? A. Well, yes, you might say so.

Q. Do you remember that in April, 1894, the estimate allowed Mr. Hoffman was less than \$300.00?

A. No, I do not remember.

Q. Now, what was the character of the work which was going on during that time—the small amount which was going on?

A. Well, it was similar to the general work, only on a smaller scale.

Q. Was not it principally in the matter of taking care of the general work—watching it so that it would not be injured by the winter water, floods, freshets, slides, and things of that sort?

A. I do not think that that entered into the work very

52] much. Although there was not very much work done, there was a good deal of effort put forth at different times.

Q. Was there anything done during that period that could not as well have been done by the employees under Mr. Hoffman in his absence as well as in his presence?

(Objected to by defendant as incompetent and irrelevant and immaterial.)

A. Well, I do not know; I was not on the work personally, and for that reason I cannot state.

Q. How long was the work shut down in that condition? (Same objection.)

A. Well, that I cannot exactly say; I know there was some time there that the weather did not permit very much work being done, but just how long a time that was I cannot exactly say.

Q. Do not you remember that in January, 1894, Mr. Hoffman got a large estimate—some sixteen thousand dollars, and for the three succeeding months his estimate was comparatively small, in April amounting only to \$239.28, and that in May again it swelled to an allowance of over \$48,000.00?

(Counsel for defendant objects to the question as incompetent and immaterial and not the best evidence.)

A. I do not know whether it was in January; it was either December, 1893, or January, 1894; there was a pretty good-sized estimate allowed by the water committee on account of extraordinary delivery of pipe that had been laid.

Q. And did not the three succeeding estimates fall off to practically insignificant amounts?

53] (Same objection.)

A. Yes, they were not very large; I do not know just how much they did fall to.

Q. You say that when Mr. Hoffman went to the Sandwich Islands he left Portland on the 9th of February?

A. Yes.

Q. And returned on the 3rd of April?

A. Well, it was in the early part of April; I could not say just what time—it was about the 3rd or early part of April.

Q. Mr. H. C. Campbell testified that he was with Mr. Hoffman in Honolulu and left him there, and that he returned himself to Portland about the first week in April, and that Mr. Hoffman got back about the middle or third week.

A. Well, my recollection of that is not very clear; it was about either the early part or the middle of April. I thought I remembered the date, but after considering it I do not have that quite clear in my mind.

Q. By what do you determine that Mr. Hoffman was gone only two weeks to Chicago in the fall of 1893 to the World's Fair; is it not a fact that he was gone three or four weeks?

A. I do not remember exactly how long he was gone; I was under the impression that he was gone about two weeks; that was his intention when he left; I think he stated about that time, possibly a little more.

Q. Is there any way by which you can determine the length of time that he was absent?

[454] A. There is a way that I could determine the exact date I think he left, but I don't know positively the date he returned, unless it was by some memorandum which I might have or might find in the books some place.

Q. You do not know whether any such exist or not?

A. I cannot say.

Witness excused.

Thereupon the further taking of testimony herein is adjourned until January 24th, 1896, at ten o'clock A. M.

Office of G. A. Brodie, Portland, Oregon.

January 24th, 1896, ten o'clock A. M.

At this time appear the parties as before, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. Rufus Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

H. D. BUSH is recalled as a witness for the defendant, and testified as follows:

Direct Examination.

Questions by MR. R. MALLORY:

Q. I show the witness a paper introduced yesterday, marked "Defendant's Exhibit W2, W2, page 2, W2, page 3"; on the first page on the last line are the words, "Bull Run, Copy of Catt's estimate on plant"; I think you stated that you copied

5] that from the original paper furnished to you by Mr. McMullen—I don't refer to the postscript at the bottom.

A. Yes, this part here. (Showing.)

Q. When you say "this part here" what do you mean?

A. Well, the part which is the estimate on the plant I copied that from a sheet that Mr. Catt sent out, and Mr. McMullen brought to the office, and below that I made a note signed by me, or my initials, showing that it would indicate simply that that part of it was my judgment of the estimate.

Q. Did you compare that with the original, so that you know it is a correct copy yourself?

A. I am certain it is a correct copy.

(Counsel for defendant now reoffers the first sheet excepting the postscript, and the same, having been heretofore received in evidence, is marked "Defendant's Exhibit W2"; counsel for the complainant objects to the introduction of the same on the ground that it is incompetent and immaterial, and that the original has not been accounted for.)

Q. I now call the witness' attention to the second sheet, marked "Defendant's Exhibit W2, page 2," headed "Bull Run Catt's estimate of costs of riveted pipe," and I will ask you if you know what that paper is?

A. That is a copy of Mr. Catt's estimate of the cost of making the pipe, including his allowance for profit, etc.

Q. Who made the copy? A. I made the copy.

Q. From what paper?

6] A. From one of the papers that McMullen brought to the office.

Q. What office?

A. Hoffman & Bates' office, in the Worcester Block.

Q. At the time that bids for the work of conducting Bull Run water to Portland were being prepared?

A. Well, I made the copy afterwards.

Q. It was one of the papers that he brought there during that time?

A. Yes, sir; we copied some of these papers before we returned them to San Francisco.

Q. Did you compare that with the original paper that you copied, so that you know it is a correct copy?

A. Yes, I am certain that it is a correct copy down to this point.

Q. Down to what point?

A. Down to "N. B."; then there is a little line there that compares his estimate with the actual bid.

Q. What words were not copied?

A. Well, those words below the pencil line, where it says, "We did bid."

Q. All except the words "We did bid," and the figures "0 275"? A. Yes, sir.

Q. These are copies of the original except that?

A. Except that it is a copy of the original.

(Counsel for defendant offers the sheet referred to by the witness in evidence, except the words indicated, "We did bid," and the figures "0 275," at the bottom, and the postscript; objected to on the same ground as that assigned to the last; the [457] paper referred to is received in evidence and is marked "Defendant's Exhibit W2, page 2.")

Q. I now show the witness a paper marked "Bull Run Pipe Line," W2, page 3, copy of "Catt's estimate of the manufacture and laying as compared with the actual bid."

A. Well, the paper is just as it states here—a copy of Catt's estimate on the item of manufacture and laying as compared with the actual bid.

Q. What, if any, portion of that paper was copied by yourself?

A. Well, the prices, and most of the first column under the head of "Catt's estimate," were copied from one of the papers that were brought by Mr. McMullen to Hoffman & Bates' office from Mr. Catt.

Q. At the time estimates were being prepared on the bid of the Bull Run waterworks?

A. Yes, the copy that was made afterwards.

Q. Who brought the paper there?

A. Mr. McMullen brought the papers there at the time he came to the office.

Q. What is the paper except the last line of the paper and the figures in the last column—what is it?

(Objected to as incompetent.)

A. Well, it is a copy of Mr. Catt's estimate of that one item on the proposal for manufacturing and laying.

Q. By whom was the copy made? A. I made the copy.

Q. Did you compare it with the original, or do you know whether it is an exact copy?

[58] A. I know I compared it very carefully at the time, and I am certain it is an exact copy.

Q. What is the last column?

A. The last column contains the prices and amounts that we actually did bid in the name of Hoffman & Bates, and everything contained in the bid for manufacture and laying.

(Counsel for defendant offers in evidence all of the paper referred to, except the last column; objected to on the ground as that stated to the offer of the other two exhibits; the paper referred to is received and filed, marked "Defendant's Exhibit W2, page 3." It is understood that counsel for the complainant makes, and is allowed to make, a general objection to these exhibits, and to all other exhibits pertaining to the matters transpiring before the execution of the contract, "Complainant's Exhibit No. 1," on the the ground that the matters that are therein contained and represented are immaterial. Counsel for defendant also offers in evidence a paper marked "Bid D" for laying and manufacturing, admitted to be a summary of the estimate of Mr. Catt, vice-president of the San Francisco Bridge Company, on the cost of manufacturing and laying the pipe for taking water from Bull Run to Mt. Tabor, under estimates invited by the Portland water committee, and the same is received and filed, marked "Defendant's Exhibit Y2," G. A. B. Ex.)

Q. Mr. Bush, was I correct in my memory about your statement of Mr. McMullen coming here from San Francisco the day before the bids were submitted, that night before? I don't know whether I was correct in my memory about that.

[59] A. I think I stated he came four or five days before.

Q. Well, if you did say the night before, you did not so intend to state? A. No, sir.

Q. What is now your best recollection about how long before he did come?

A. I think it was four or five days; I have forgotten exactly the exact number of days.

Q. I don't know whether I asked you when you were on the stand before, but I will ask you now whether or not you prepared, before any estimates were received or any papers re-

ceived from Mr. McMullen, an estimate for this work of manufacture and laying the pipe, etc.

A. I prepared an estimate for the item of manufacture and laying.

Q. What, if any, other items were furnished after this by Mr. McMullen, and by whom were they made out?

(Counsel for complainant objects to the question on the ground that it is cumulative, the witness having already testified in regard to these matters.)

A. Well, Mr. McMullen brought estimates made by both Mr. Wood of his San Francisco office and Mr. Catt of the New York office.

[460] Q. I will ask you to look at the paper marked "Defendant's Exhibit U2," and marked in red ink at the top "Copied from San Francisco Bridge Company's estimate," then in black ink "Portland Water Works' Bid A, Head Works," and also paper marked "Defendant's Exhibit V2," in red ink "Copy of San Francisco Bridge Company's estimate," and in black ink "Portland Water Works' Bid C continued manufacture and laying," and I will ask you to state if you ever have seen the original of those papers.

A. Well, I can only say in a general way that before returning those papers to Mr. McMullen's office, Mr. Hoffman wanted them copied, and I copied some of them, and Mr. Donnell copied some, and I undoubtedly saw the original of them during the time that we were preparing bids.

Q. By whom was it brought to the office?

A. Well, it was brought to the office by Mr. McMullen.

Q. Whose estimate did it purport to be?

A. I don't remember; I think it is one of Mr. Wood's estimates.

Q. The original paper was a paper brought to the office by Mr. McMullen?

A. Yes, and this copy was made by Mr. Donnell.

(Counsel for defendant now reoffers the paper last shown the witness in evidence; counsel for complainant objects to the same on the ground that the original has not been accounted for, and on the further ground that the witness did not make the copy, and did not compare, and has not testified that he knows it to be a copy, but that it purports to be such, and was made by a third party; the paper referred to is received and

filed, and has heretofore been marked "Defendant's Exhibit U2 and V2," respectively.)

Q. You knew Mr. Foy very well, did you not?

A. I knew him after he came on the work. I did not know him before that.

[461] Q. What do you know of him as a foreman or superintendent, as being a man of extraordinary qualities—what were his qualities?

A. Mr. Foy was an energetic man, but he apparently had not had any experience in metal work, and he devoted most of his time to the work of digging the ditch.

Q. What was the fact about subcontractors, if you know anything about where they came from?

A. Do you mean the foremen?

Q. Yes.

A. Well, Mr. Foy brought over three or four foremen with him; they were also men that had been accustomed to railway work; they were at work under him digging the ditch.

Q. What was there peculiar about their qualifications?

A. Well, I don't know that there was anything peculiar at all about their qualifications; they were like a good many other railway men—foremen around in this country.

Q. Are that class of men difficult to find, or are they easily picked up?

A. Well, we could have picked up a great many of them at that time.

[462] Q. Did you notice that there was anything superior—any peculiar superiority about these men that Mr. Foy brought over with him as foremen?

A. Well, one of them was a very good man, indeed; his name was Lynch, and another named Hunter Smith was a very poor man—cost us a good deal of money.

Q. Do you know a man by the name of Cooper, an engineer? A. Yes, sir.

Q. Was he here during the time that the work of preparing bids was going on?

A. He was here in the city, yes, sir, during some of the time; my impression is that he went away before the bids were put in.

Q. What, if anything, did he have to do with preparing them, if you know?

A. Well, I think he had nothing to do with preparing them.

Q. I think you stated that you knew Mr. Lockwood?

A. Yes, sir.

Q. What about his connection with preparing the bids?

(Counsel for complainant objects to the question on the ground that it is cumulative, the witness having already testified concerning Mr. Lockwood.)

A. Well, Mr. Lockwood was in the office a good deal of the time, and he worked on the bids to some extent, more particularly on the bridges; that was the part he was most interested in.

Q. In his testimony Mr. McMullen stated that when he came up from San Francisco he brought all the data he had relating to this pipe line business, and took it to Mr. Hoffman's office, and that Mr. Hoffman brought all that he had, and Mr. McMullen and Mr. Hoffman and Mr. Hoffman's engineer and Mr. Lockwood and Mr. Cooper set down together and discussed the matter, and out of the most of the data that they had, and the information they were getting constantly from [463] the east; they finally formulated a bid that was put in; what was the fact about that?

(Counsel for complainant objects to the question as being cumulative, the witness having already testified in regard to these matters.)

A. The fact is that when Mr. McMullen first came up here we compared all our estimates of the cost—

Q. When you speak of "we," who do you mean?

A. I mean Mr. Hoffman, Mr. McMullen and myself; and Mr. Lockwood was there some of the time, I think not at the first, and we finally settled on the fact that the estimates of the cost must be correct.

Q. That is the cost of manufacturing and laying the pipe—what led you to that conclusion?

A. Well, because the three estimates were practically the same; after that it became a question simply of deciding how much profit to put on the job, and that subject was talked over back and forth principally between Mr. Hoffman and Mr. McMullen themselves.

Cross-Examination.

Questions by MR. L. B. COX:

Q. Mr. Bush, Mr. Foy's place as superintendent on this work was in connection with the excavation of the ditch, was it not?

A. Mr. Foy's place as superintendent of the work was in connection with all the work in the field, digging the ditch, laying the pipe, and getting up the camps.

Q. What was the principal work done during the time that Mr. Foy was superintendent?

[464] A. Well, the digging of the ditch and laying and riveting the 35-inch pipe from Lusted's to Mt. Tabor.

Q. Mr. Foy discharged the duties of his position satisfactorily, did he not? A. Not altogether so.

Q. He was retained by Mr. Hoffman for a considerable time? A. Yes, sir.

Q. He afterwards took a subcontract on the ditch in the matter of its excavation? A. Yes, sir.

Q. And did that work satisfactorily?

A. That work was done very satisfactory; yes, sir.

Q. Who looked after any deficiencies there might be in Mr. Foy's work and corrected them?

A. Well, I was supposed to follow up and furnish the experience that he had not had, on the riveting work, I think.

Q. So that if Mr. Foy did not fill the requirements of his position in any particular, it fell back on you to supplement what he was doing? A. Yes, sir.

Q. And you did do it? A. I did, yes, sir.

Q. Mr. Hoffman was also a man without experience in this work, was he not.

A. This particular kind of work, yes, sir.

Q. As much so as Foy? A. Yes, sir.

Q. You say that you prepared all the estimates of cost which Mr. McMullen brought here, what you had made, and from that you determined that the three estimates, being approximately the same, must be nearly correct?

A. Yes, sir.

Q. Is it not a fact that that is the only use that was made of those estimates to determine the cost price?

[465] A. Well, I don't know but what it was.

Q. The calculation of the engineers had nothing to do with the determination of McMullen and Hoffman as to what amount they would add to the engineers' estimate for profit, had it? A. No, sir.

Q. McMullen and Hoffman determined that themselves, irrespective of anything the engineers did? A. Yes, sir.

Q. How do you know these papers, "Exhibit U2 and V2" to be copies of any other papers—can you swear now, as a witness, that they are true copies of any other papers whatever?

A. Well, I think I can swear they are copies subject to such mistakes as Mr. Donnell might possibly have made in making the copies.

Q. Do you remember anything that was contained in the originals?

A. I don't remember any of the exact figures.

Q. You cannot now without reference to that copy undertake to say what was contained in the original at all on any item, can you? A. No, sir.

Q. How can you say it was a copy of any original paper?

A. Well, I remember when Mr. Donnell copied it.

Q. Is it all you know about the matter that there was some original paper, and Donnell made a copy from some original paper, which you assumed to be a copy in your mind?

A. Well, I think they must be copies.

Q. Is it not an assumption on your part—is not that true?

[466] A. That depends on what you call an assumption.

Q. Well, you don't pretend to make a sworn statement that any solitary statement contained in either of these papers, "Exhibit U2 and V2," is a copy of anything that McMullen brought to the city of Portland, do you?

A. To the best of my knowledge and belief they are copies I cannot swear to it as I might if I had made the copies.

Q. Then your testimony in regard to those being copies of papers which McMullen brought to Portland is based on the fact that some of those papers or some of such papers were given by Hoffman to Donnell to be copied, and that these two sheets are in Donnell's handwriting, and purporting to relate to Bull Run matters, and from those facts you assume those to be copies of McMullen's papers? A. Yes, sir.

Q. Look at "Defendant's Exhibit Y2"; is that a paper from which you made a copy, which is found on the third page of "Defendant's Exhibit W2"?

A. Yes, sir; that is the paper from which this copy was made.

Q. Do you say now that your copy is a true copy of the "Exhibit Y2"? A. Yes, sir.

Q. I find on the "Exhibit Y2" the second item, "29 man-holes 255, \$30—\$7,650," and in your copy "Manholes 255, \$30—\$7,560"; do you say that is a true copy?

A. The five and six are reversed.

Q. That is a mistake?

A. Yes, sir. I might explain now there were two estimates furnished by Colonel Smith, one called for 11,782,000 pounds [467] and one for 11,784,000 pounds, and some of the estimates that were made were on the basis of the 84,000 pounds; this one here is; that figure there does not come into this statement.

Q. The first figure of the page you mean to say?

A. Yes, sir.

Q. The \$324,000 item is based upon the 11,784,000 pounds.

A. Yes, sir.

Q. I find an entry in "Exhibit W2, page," "2 stand pipes," that is an addition by you, is it not, not found on Catt's estimate at all?

A. No, sir, that is steel plates.

Q. On "Exhibit W2, page 3," there appears the words "2 stand pipes"; that is an addition by you, not found on Catt's estimate?

A. Those words are an addition; yes, sir.

Q. I see an entry on Catt's estimate "Exhibit Y2," "foundation concrete or cement," and in your estimate "W2, page 3," "foundation concrete."

A. It could not be concrete or cement.

Q. Here it is (showing).

A. That is what it says, but it does not mean anything.

Q. It is not so worded on your statement? A. No, sir.

Q. I find in the statement "W2, page 3," the words "Sleeve joints" not to be found on the Catt estimate, is it?

A. Those words are not.

Q. I find the first item under that head in the paper to be "Wrought Iron, 7,000—10, \$700"; on the copied paper

[468] "Wrought Iron Sleeves, 7,000—10, \$700"; you departed there again from Catt's paper?

A. Not from the figures, from the wording.

Q. You omitted from Catt's paper the word "sleeves"?

A. Yes.

Q. In your paper you have inserted next below the word "trestles"; that is not found on Catt's paper, is it?

A. Yes.

Q. That is not found on Catt's paper. A. No, sir.

Q. In the Catt paper I find the second item below that "Foundation concrete, 400—\$12, \$4,800"; on your paper simply the words "Concrete 400 years, \$12—\$4,800"; there is a discrepancy there again?

A. Discrepancy in the wording.

Q. I find on your paper a footing, "Total without excavation, \$318,638" that does not appear at all on Catt's paper.

A. No, sir.

Q. I find, further, on the next statement below on your paper the words "Excavating and refilling"; that don't appear on the Catt paper, does it?

A. No, sir, the heading is omitted from this paper.

Q. I also find certain footings on your paper, or a certain footing on your paper of an item under the head of "Excavating and refilling amounting to \$97,400"; that does not appear on the Catt paper, does it? A. No, sir.

Q. In Catt's paper I find a number of figures preceding each one of the entries which he has listed, all of which are omitted on your paper, is not that the fact? A. Yes, sir.

[469] Q. It appears, then, that you have taken a number of liberties in making a copy of Catt's paper, is not that the fact?

A. There seems to be some minor changes in the wording, etc.

Q. Still you state it is an exact copy?

A. It is not absolutely an exact copy.

Q. Now, can you say that what you have testified are copies of other papers which you made, and which are not before you, are any better copies than page 3 of "Exhibit W2"?

A. I don't know as I testified there are any better copies.

Q. Can you say that there are any better copies?

A. No, sir, I cannot say that they are any better copies.

.Q Can you undertake to say that they are exact copies at all.

A. I swear to the best of my belief they are exact copies as far as the figures are concerned.

Q. You mean by that they are substantially good copies?

A. Yes, sir.

Q. You don't pretend to say that they are exact copies?

A. There might be slight changes in the wording.

Redirect-Examination.

Questions by MR. R. MALLORY:

[470] Q. The total result of the figures that you copied is the same, is it not, and you know it to be such?

A. Yes, sir.

Recross-Examination.

Questions by MR. L. B. COX:

Q. You got that total by an error in the computation, did you not?

A. Well, I copied Mr. Catt's total without adding it up; there is an error there, and it shows that I copied his total instead of adding it up.

(Signed) HARRY D. BUSH.

Witness excused.

C. F. SWIGERT is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by MR. R. MALLORY:

Q. Mr. Swigert, state your name, age, residence and occupation?

A. My name is C. F. Swigert; age 33; I am treasurer of the Pacific Bridge Company, also of the City & Suburban Railway Company; my residence is Portland, Oregon.

Q. How long have you been connected with the Pacific Bridge Company?

A. Since 1880.

Q. In what capacity?

A. Well, I don't know exactly what, before I became treasurer—sort of agent.

[471] Q. Have you had occasion to do any business in the way of contracting for that company? A. Yes, sir.

Q. I will ask you what is the business of the Pacific Bridge Company? A. General contracting.

Q. General mechanical work and other work?

A. Yes, general contract work.

Q. Were you acquainted with Mr. Hoffman in his lifetime?

A. Yes, sir.

Q. Do you know Mr. McMullen? A. Yes, sir.

Q. Are you acquainted with the work of constructing the pipe line from the head works of Bull Run to Mount Tabor?

A. Only in a general way.

Q. You have a general knowledge of the situation of the country? A. I have been over the line.

Q. You know about the character of the work that was to be done? A. Not in detail; I have seen it.

Q. You have a general knowledge of what it is?

A. Yes—well, I never made any figures on the work; I did not make any estimates at all.

Q. Do you know anything about the work that Mr. Hoffman had to do as superintendent of the manufacturing and laying of the pipe from Bull Run to Mount Tabor for conducting water to Portland?

A. Well, I knew that he was the contractor for it and the head of it. I don't know that I ever heard him refer to himself as superintendent; he was the head of the firm.

Q. And general manager of it? A. Yes, sir.

[472] Q. I will ask you if you know what he did and what would be required of him to do in the position that he occupied?

(Counsel for complainant objects to the question on the ground that the witness has not shown himself competent to testify on that subject.)

A. I cannot state, of course, exactly what he did. I can state what he would ordinarily do.

Q. State what he would have to do in such a position?

A. He would have to have a general supervision of the work; he would have to handle the financial matters, and I know he did handle the financial matters, because he talked to me about it.

Q. You say that he talked with you about it?

A. Yes, sir. And he would also, as a natural result of his position, have the general overlooking of all matters pertaining to the work.

Q. I will ask you to state what experience you have had in doing work of general contracting similar to that Mr. Hoffman was required to do—not exactly like it in detail, but in a general way. What experience have you had, or what knowledge have you had in matters of this sort, and the value of such work, the superintending of such work? State if you have had any experience or not.

A. I have never had any experience in superintending work of that magnitude. I have superintended work of lesser magnitude.

Q. Works similar in their character to this?

A. Well, they were general contract work. I never had any pipe line. I have superintended the building of bridges, wharves, and some little grading work.

Q. Where have you done that kind of work?

[473] A. In Oregon, Washington, Central America; I did a small job in California.

Q. You say you did work in Central America? How large a contract?

(Counsel for complainant object to any testimony as to what the witness did in Central America, as too far removed from Oregon, unless it be shown that the conditions prevailing were similar to those prevailing in Oregon where this contract was done, on the ground that the same is irrelevant.)

A. Well, the price of the work was \$115,000. I was there; that was the only job I did at that place.

Q. How extensive work have you done in Washington and Oregon?

A. Jobs of all sizes; about \$80,000 is the largest.

Q. From what experience you have had in these matters, do you know what the services of a superintendent ought to be worth, and when I say superintendent I mean general manager occupying the relations to the work that Mr. Hoffman held to this?

(Counsel for complainant object to the question on the ground that it is incompetent, it not being shown that the witness knew what Hoffman did, and it not being based upon

any such hypothesis; and on the further ground that the witness has not shown himself qualified to pass an opinion on the subject, and his answer thereto is incompetent.)

A. I would have an opinion.

Q. Just answer whether you would have an opinion or not.

[474] A. I did express my opinion to Mr. Hoffman on the trip that I made with him to Bull Run.

Q. Just answer the question generally, yes or no?

A. My opinion is that \$15,000 a year—

Q. No, I did not ask what your opinion was. I asked you to state whether or not you have sufficient knowledge of what he did to know what his services are worth.

(Same objection.)

A. Yes, sir.

Q. Now, I will ask you to state, from what you know of what Mr. Hoffman did in connection with the contract as general manager, what do you say his services were worth per year or per month?

(Same objection.)

A. I think his services are worth \$15,000 a year. I think that would not be too high for the services that he performed.

Q. Well, how did you acquire knowledge of what services he performed—from Mr. Hoffman?

A. Well, from visits to his office and from going out with him on the line, and in a general way seeing what was to be done.

Q. And conversations with him?

A. Yes, I had some conversation with him; I have had a number of conversations with him.

Q. Now, Mr. Swigert, did you ever have any conversation with Mr. Hoffman about the matter of procuring sureties on his bond on the contract which he had for manufacturing and laying pipes from Bull Run to Mount Tabor?

(Question objected to as incompetent.)

[475] A. Yes, sir.

Q. State when and where that conversation occurred, if you know.

(Same objection.)

A. In July, 1894, I made a trip to Mount Hood with Mr. Hoffman.

(Counsel for complainants now interposes a further objec-

tion to this evidence, on the ground that the information the witness got from Hoffman, in addition to being hearsay, was derived a long while after the bond had been procured.)

The WITNESS.—Shall I go on?

Q. Yes.

A. We made a trip to Mount Hood together and were gone several days. We were together a good deal of the time, and he took occasion to say that it was a great relief to him that Mr. Willis volunteered to go on the bond. He said Mr. McMullen did not and could not furnish a bond, and he was safe on one of the bondsmen, Mr. Bates, but he did not know where to get the other, and that he went to Mr. Willis' office and spoke to him about his trouble, and Mr. Willis volunteered himself to go on the bond, and that relieved him, and he had not expected Mr. Willis to do that; that he had supposed Mr. McMullen would furnish a bond, which he should do.

Q. I will ask you if you had any other conversation with Mr. Hoffman in regard to the manner in which the contract was obtained in the first instance.

(Objected to as incompetent.)

A. Yes, he told me at some length the details of the figuring, where the information came from; that Mr. McMullen brought a lot of information, and that Mr. Bush made estimates, and he laid particular stress upon one point, that Mr. McMullen came up prepared to bid a sum much lower than he then believed that the work could be done for, or that he was prepared to bid for the work, and we had some argument and some question as to what the work ought to cost at the time. He said Mr. McMullen thought the work could be done for much less than it really was finally let for.

Q. Did he say how the bid came to be raised—at whose instance?

(Same objection.)

A. Yes, he said it was at his instance; that he continually wanted the bid higher than Mr. McMullen did.

Q. What, if anything, was said about the bid as finally submitted being reduced, and at whose instance?

(Same objection.)

A. Well, he said it was—I am not positively sure that it was the morning that the bid was put in; it was very close to the time that the bid was put in—that Mr. McMullen came in and said they would have to cut the excavation; that he knew

or felt positive that other people were making a bid lower than their bid, and in order to secure the work they would have to cut their figure, and he said they did cut the figure.

Q. Was anything said by him to you concerning the bid put in by Mr. McMullen in the name of the San Francisco Bridge Company?

(Same objection.)

A. He said Mr. McMullen put in a bid in the name of the San Francisco Bridge Company.

[477] Q. Did he say what the purpose of it was, if anything?

(Same objection.)

A. Well, he said that the Hoffman & Bates bid was the lowest aggregate bid, but that the San Francisco Bridge Company's bid was lower on some particular points—in some particulars—on the furnishing of the steel plates. I asked him why that was. He said that they had an idea that either of their bids might take the steel plates, and that in case his bid was the next higher than the San Francisco Bridge Company's their intention was to try to get it on the total aggregate low bid, but if necessary they would take it on Mr. McMullen's bid on the lower price for the plates.

Q. Did he say anything about this condition of things—that in case the bid of the San Francisco Bridge Company on the plates should be the next lower to the bid of Hoffman & Bates on the same—if any arrangement was made as to how they would manage to get the work on the bid of Hoffman & Bates?

(Same objection, and also on the ground that the question is suggestive and leading.)

A. Yes, he said that they intended to plead that they ought to have all or none of the work—that is, that the aggregate low bid should be the one considered. I objected to that and said I thought the work was advertised in different sections, and I did not see how they could have hoped to win on that, as the result showed that it was let in separate sections. He said that Mr. McMullen thought they could withdraw the bid anyway. I asked him what reason he had for thinking so, and he said Mr. McMullen said it had been tried in California, and that they could not hold a certified check if the men wished to withdraw.

[478]

Q. What, if anything, was said as to whether any arrangement was entered into between Hoffman and McMullen as to

whether, in case the Hoffman bid was the next highest to McMullen's, that McMullen should withdraw—did he say anything about any arrangement of that sort being made?

(Same objection.)

A. He said that was the intention; that they would do that if they could.

Cross-Examination.

Questions by MR. L. B. COX:

Q. Mr. Swigert, did all these matters concerning which you have testified as having been communicated to you by Mr. Hoffman occur during the trip of you and himself to Mount Hood?

A. I think all these matters did, Mr. Cox; we had a good many conversations.

Q. I speak of the matters now concerning the circumstances of getting the contract and McMullen bringing a lot of estimates and information to Hoffman's office, and Bush making estimates.

A. Yes, sir; that occurred on that trip.

Q. Hoffman told you that McMullen came up prepared to bid less than he thought advisable to put in, and that Hoffman continually wanted the estimate raised, and that it was reduced at McMullen's instance, and these matters which you have testified in regard to their trying to withdraw certain bids to get the contract for the whole work on the aggregate bid—did that occur on that trip?

A. Yes, that was on the trip to Mt. Hood.

Q. Mr. Hoffman must have been extremely communicative on that subject during that trip, was he not?

A. Oh, yes he was, yes.

Q. What time did you say that was?

A. That was in July, 1894. I think we left here on the 17th of July. I could find out if it is of any importance.

Q. 1894? A. Yes, sir.

Q. At that time there had been a breach between Mr. Hoffman and Mr. McMullen, was there not, and Mr. Hoffman was claiming to have the thing in his own hands?

A. Yes.

Q. And he was undertaking to tell you why he had put McMullen out of the firm?

A. Well, I really don't know whether that was his intention or not, Mr. Cox.

Q. Well, did you and he have any talk about his expelling McMullen from the firm?

A. Yes, we talked about that.

Q. He gave you these reasons, did he not?

A. No, he did not mention this as any reason why he should have expelled Mr. McMullen. He said Mr. McMullen did not keep his part of the agreement.

Q. Consequently he put him out?

A. Yes, sir.

[480] Q. You were on very intimate terms with Mr. Hoffman during his lifetime?

A. Yes, I think I can safely say I was.

Q. You had frequently been associated with him in business enterprises? A. Yes.

Q. And personally were on exceedingly friendly terms with him?

A. Yes. There may have been times when we have not been so particularly cordial, but on the average I think we were.

Q. The business relations of the Pacific Bridge Company with Mr. Hoffman at that time were pleasant, were they not?

A. Yes, they had been for a number of years; we were at one time associates.

Q. Is it not a fact that the Pacific Bridge Company is now indebted to the estate of Hoffman in the sum of \$5,000?

(Question objected to as immaterial.)

A. Yes, sir.

Q. You have felt and expressed sympathy with Hoffman, have you not, in his relations with McMullen concerning this work?

A. Yes, I have felt it, and I suppose I have expressed it; I do not remember any particular instance.

Q. And your sympathies are based upon your understanding of the matter as given to you by Mr. Hoffman?

A. I suppose it must have been. I never heard anything from Mr. McMullen on the subject.

Q. You were not on such friendly terms with Mr. McMullen as you were with Hoffman?

[481] A. I cannot say that we have ever been intimate; we have always been friendly.

Q. But you did not have the same cordial relations with Mr. McMullen as you did with Hoffman.

A. No, sir.

Q. You say you knew Hoffman as the head of the firm. What firm did you refer to?

A. Hoffman & Bates.

Q. That was Hoffman, was it not?

A. Well, it was principally Hoffman; I do not know that anybody else had any interest in it; he was recognized as the head of the firm.

Q. How many times did you go on the line of that work with Hoffman?

A. I remember once that I went out to the Sandy Bridge with him, and I was out beyond Mt. Tabor twice.

Q. How far out?

A. Beyond Mt. Tabor. One of the times we went to Grant's Butte, and the other time we did not go quite so far.

Q. How far is Grant's Butte?

A. I think that is about three miles from Mt. Tabor.

Q. One visit you went about three miles on the line of work, one trip you did not go so far, and one trip you went to the Sandy Bridge? A. Yes.

Q. How far is that?

A. From Portland to the Sandy Bridge is about thirty miles; I am not sure about that; and I think it was about five or six miles from the Sandy Bridge to the head works.

[482] Q. What time did you go to the Sandy Bridge?

A. I think in November, 1894. I know they were putting the pipe across the bridge; it had been laid from both ways to the Sandy Bridge, and they were laying it on the Sandy Bridge when I was there.

Q. It was about the completion of the work?

A. Yes; they completed it shortly after that time.

Q. What time was it during the progress of the work that you went on the trip to Grant's Butte and the place you have stated?

A. I do not remember, I cannot say. I drove out with Mr. Hoffman in the afternoon; I have no recollection of the time.

Q. Did you make any close examination of what was being done, or what Hoffman was doing on this trip?

A. Oh, not very much, generally.

Q. How many times did you visit his office and discuss these matters with him, and to see what he was doing?

A. I do not know; I have been there quite often.

Q. Do you think a dozen times, all told?

A. Yes, I think more than that. I did not always discuss this matter when I went there.

Q. What was Hoffman doing when you observed him in his office?

A. Well, I cannot say in detail what he was doing.

Q. Smoking cigars and talking to you?

A. He smoked some cigars and he talked some to me.

Q. Is it not a fact that Hoffman had competent foremen to take care of this work?

[483] A. I believe he had a clerical force; I do not know of any more. I thought he looked out for everything himself; I was under that impression.

Q. You never have had any experience in constructing work of that character yourself?

A. Never any pipe line.

Q. What is the closest you ever came to it?

A. I have had something to do with railroad grading, and this last summer we laid some pipe, but nothing of that magnitude.

Q. What sort of pipe?

A. Distribution pipes, from 18-inch down.

Q. Where—in the city here? A. No; in Astoria.

Q. What was the amount of the contract?

A. Well, the furnishing and laying was about \$40,000, all told.

Q. What is the extent of your experience in railroad grading?

A. Oh, nothing that was remarkable at all. We graded about ten miles of railroad in California.

Q. How were the conditions there in regard to cost of labor and material and the employment of superintendents and things of that sort, in comparison with those that prevailed here at the time this work was done?

A. Well, the experience that I had there was a number of years ago; it was probably twelve or thirteen years ago. I remember very little about the prices that prevailed then. I do not know anything about the prices that prevailed with

Mr. Hoffman, except that he told me that he paid Foy \$250 a month.

Q. I am not talking about the subcontractors; I am speaking about the general conditions.

[484] A. I do not believe I know how to answer that question.

Q. What was the magnitude of the railroad grading that you did?

A. It was not heavy work; there was about ten miles done altogether.

Q. What was the size of the contract?

A. The contract was for a large sum, but was not fulfilled. I was a subordinate there.

Q. About how much of it did you do?

A. You mean myself personally?

Q. Yes.

A. I was employed as timekeeper; I was not in charge.

Q. How much were you connected with?

A. About ten miles.

Q. Ten miles of work? A. Yes, sir.

Q. That is the closest character of work to this under consideration that you have ever had any direct connection with?

A. In the way of excavation, yes, sir.

Q. Have you ever had anything to do with pipe laying except this Astoria business? A. No, sir.

Q. What, then, do you base your estimate of Hoffman's services at \$15,000 a year for superintending upon?

A. Well, principally upon the magnitude of the work, the large amount that was involved, and the large amount that would be sacrificed by incompetent management.

Q. Well, have you made any allowance there for his having competent or incompetent persons in his employ?

[485] A. Oh, he was supposed to look out for that; he was the man that was at the head of it; the others were all subordinates.

Q. Assuming that Hoffman had a full force of qualified subordinates under his direction, an engineer, superintendent, bookkeeper, purchasing and disbursing agent—would that alter your estimate in any degree as to the value of his services?

A. I should judge if he was at the head of it he would be entitled to the emoluments.

Q. He should have that anyway? A. Yes.

Q. Do you think anything of the fact that Mr. Hoffman had never had any experience in that sort of work himself before?

A. He never laid any pipe—I don't believe he ever did; I don't know; but he had experience in quite a number of works—grading works, and things of that kind.

Q. Grading works? A. Yes.

Q. Now, Mr. Swigert, do you know, during the whole time that you have lived in Oregon, any man on any similar work, whether in character or value, who has filled the position that Hoffman has filled, and who got \$15,000 a year for his services or half of that?

A. No; I do not know what they got.

Q. You then do not know what prices have prevailed for superintendents in such cases?

A. In such cases the superintendent was usually the contractor, ordinarily.

Q. Hoffman was the contractor in this case?

A. Yes, sir.

Q. Then that would be a parallel case with this?

A. Yes, if they got it all it would be.

[486] Q. Do you know any instance in which a superintendent, making a charge or claiming a charge against work in any degree similar to this, either in character or amount, has claimed or been allowed, whether he was the contractor himself or operating for others, one-half the amount which you say would be a proper compensation in this case?

A. I do not know of any similar case; I do not know of anything that I would call a parallel case at all.

Q. Suppose that Hoffman was interested with McMullen in this work, and that they were equal partners, and that Hoffman was superintendent, making a charge against the firm, what would you say then would be a proper charge for his services?

A. Well, it seems to me if that was the only question involved, Mr. Cox, and Mr. Hoffman was a partner and he managed this work, and in managing this work he lost his opportunity to engage in other work, which Mr. McMullen did not do, my estimate is based altogether upon the actual performance of the duties of superintendent—that is, some sacrifice that he made in order to perform those duties.

Q. Do you know of any sacrifice that Mr. Hoffman made?

A. I cannot state them in detail. I only just think he made them.

Q. Don't you think he would be very likely to make such sacrifices as he may have done for the amount of \$15,000 a year?

[487] A. Oh, he might easily have made \$15,000 a year in other respects.

Q. He might have made \$15,000 otherwise?

A. Yes, he could have made a good deal more than that.

Q. He also had his profit in this work over and above his salary?

A. Yes; but that would be his share; that would be what he would be entitled to over and above his share as a partner.

Q. Now, Mr. Swigert, do you know of any contracts of this magnitude that Mr. Hoffman ever had had before that?

A. Well, I really do not know the amount of the contracts. He had a great deal of work.

Q. This was the biggest one that you know of his having?

A. I do not know the figures. I think the Kenewick bridge amounted to about \$300,000, and the snowsheds on the Northern Pacific ran up into the hundreds of thousands.

Q. Did Mr. Hoffman build these snowsheds?

A. It was the firm of Hoffman & Bates.

Q. Do you know what arrangement was made between him and his partner?

A. They were all working partners; I do not know that there was any particular arrangement with Mr. Bates; they simply divided profits.

[488] Q. This is true, is it not, Mr. Swigert, that commencing with the summer of 1893, after the time that the actual construction of this work commenced, there was a great financial crisis prevailing throughout the country and continued throughout the entire prosecution of this work, which had the effect of cutting down prices of everything—labor, material, salaries, and everything of that sort.

A. Yes, sir.

Q. And you say that during this time and under those conditions, in your judgment, \$15,000 a year was a proper salary to be allowed Hoffman for his work under this contract?

A. Yes.

Q. What would you say would have been a proper compensation in 1892 for similar work?

A. I do not think there would be much difference. I think that his services were all the more valuable rather than otherwise if he had to labor under those additional difficulties.

Q. I will ask you this question: Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland, under a contract which stood in Hoffman's name. The contract price was \$465,667.00 and the contractor was required to furnish a bond in the sum of \$140,000, which bond was secured by Hoffman, the sureties being two in number, one a former partner of Hoffman and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen each of them was to contribute an equal amount of capital to the transaction of the enterprise, and they were to share equally in its profits and losses. It was also agreed that Hoffman, being a resident of the city of Portland, should be the active superintendent of the work, but that McMullen, who resided in San Francisco and controlled offices there and in New York and Seattle, [489] should render all services which should be required of him at those points. The work was actually begun in June, 1893, and between March 10, 1893, (the date of Hoffman's contract with the water committee), and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and collecting plant, laborers, etc., and McMullen working on the same thing from San Francisco, Seattle and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendency of the work and gave it all necessary attention, and McMullen continued his aid, of the character above indicated, until September 20, 1893. During this time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work, was also engaged in other contract operations. Of the plant, consisting of implements, tools, live stock, machinery, camping outfits, etc., required for the work between June and September 20, 1893, Hoffman found two-thirds and McMullen one-third,

the value of the latter being estimated from \$1,600 to \$2,300. Owing to his inexperience in such work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made of him by Hoffman except in the matter of furnishing money, until September 20, 1893. During this time an engineer and a superintendent of the field work, together with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20, 1893, [490] McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned, but Hoffman advanced from his private means at various times in the months of June, July, and August, 1893, the sum of \$14,500 or thereabouts, which was covered by his estimate paid by the water committee on Sept. 1, 1893, and thereafter Hoffman did not have, or need not have had, any money of his own in the job. Money was very tight, and salaries and wages were affected thereby, as you have testified. In the partnership contract between Hoffman and McMullen there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts what do you deem a proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen, during the time between March 6 and September 20, 1893?

(Counsel for defendant object to this question, for the reason that it is an assumption of facts not proven, and that it is immaterial, and that the question is not proper cross-examination, and that there is no allegation in the complaint justifying any testimony as to the relative value of services of McMullen and Hoffman, and no claim for any compensation, either directly or indirectly, to McMullen for whatever services he has performed, and that the only question in the case is, what was the value of the services which Hoffman rendered as general manager to this work, and not what was its relative value as compared with what Mr. McMullen may have done or furnished.

[491] A. That is a pretty long question, Mr. Cox, and I do not know exactly what you want me to answer.

Q. Assuming the facts presented to you in this question to be true, as representing the circumstances and conditions

connected with this work—in the light of those facts, what do you say was a reasonable compensation for Hoffman for his services during the period of time indicated?

A. The hypothesis does not change my opinion at all as to the compensation to Mr. Hoffman.

Q. You still say \$15,000 a year?

A. Yes, I see no reason to change that.

Q. And you say that, whether McMullen did anything or did not do anything?

A. Well, I think if Mr. McMullen did anything, he should be allowed for what he did. I do not know what he did; I do not know what his services amounted to; the allegations there are not very clear on that.

Q. Then if McMullen had contributed anything of value to the enterprise during the time indicated, that value, after it should be ascertained, should be deducted from your estimate as to what should be paid Hoffman?

MR. MALLORY.—The witness has not said that.

A. I should not think it should be deducted. I should think if Mr. McMullen contributed services that were of value they should be allowed for; but I have no knowledge of what he contributed, and the allegations, it seems to me, are very indefinite as to what he did contribute.

Q. Does the fact that instead of the time indicated by my hypothetical question—three months—this work continued for some twenty months, make any difference in your estimate as to what should be allowed Mr. Hoffman for his services during the continuance of that work?

[492] A. I don't believe I clearly understand the effect of your question, Mr. Cox.

Q. Well, if the job had lasted a short time you say it would be worth so much per month during that time. Would it alter your opinion in any degree if the job had been a very extensive one and covered a great many months—would you allow Mr. Hoffman the same rate for twenty months as you would allow him for three months?

A. Why, yes, I think so, Mr. Cox; I do not see any particular reason why I should not.

Q. Between the 10th of March and the 1st of June Mr. Hoffman was engaged in getting ready for the work which

was commenced in June. Do you know what he was doing during that time? A. No, sir. *

Q. Would you say his services during that time were worth as much as after the work had actually been commenced?

A. No, sir; I should not think they would be.

Q. What would you say a proper allowance for his services would be during the months of March, April, and May preceding the active commencement of operations?

A. That, is supposing he devoted his time to the matter?

Q. Yes, getting ready for the job, of which you say you have general knowledge.

A. That is a question I have not given any thought at all to, Mr. Cox, but I should judge five or six hundred dollars a month would be a proper allowance.

Q. \$500 or \$600 a month? A. Yes, sir.

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Redirect Examination.

Questions by MR. R. MALLORY:

Q. Mr. Swigert, I would like to ask you this question: In the matter of preparing for a work of that magnitude, would or would not the services of a manager, a person who had to furnish supplies and men to carry it on and provide a plant and arrange for it, would his services be worth any less then than they would be after he got it all organized and ready to proceed—where he had to prepare his plans—would his services be less during that time than it would be while he was simply carrying out the plans that he had arranged?

(Counsel for complainant object to the question on the ground that it is based upon a false assumption of facts.)

A. Yes, I think they would, for the reason that the preparations for carrying out this work were not of a character that involved the expenditure of a large sum of money, so that the preparation for the work was not really as difficult a matter—that is, the preparation for the plant, which I understand was Mr. Cox's question; he was getting ready and preparing a plant which was required for this work. During the time that he was making those preparations I should judge his services were not so valuable as they were when the work was actually in progress.

Q. Let me ask you this question: When a work involving the expenditure of nearly half a million of dollars had to be provided for to establish the work in getting ready and getting [494] ready for carrying it forward, and plans had to be matured for conducting it, thus requiring time, and there was a space of three months from time the contract was let until the work in the field actually began—now, I want to know whether, in your opinion, the services of a man who organized this system and arranged for the money to put it in position so that he could proceed with the actual construction when the time came would be of any less value than it would be when he was actually executing it?

A. Well, I was not taking into account the question of arranging for money or contributing money in my estimate of the value of his services.

Q. Then I will ask you this question: Suppose that between the 10th day of March—the time this contract was let or signed by the city—and the 1st of June, Mr. Hoffman was required to and did make arrangements for procuring the necessary funds to start the work and make arrangements for conducting it, and arrange for the employment of his men, and arrange for his plant, and arrange generally so as to be ready for the work to carry it on after the first of June—now, what less value would there be to his services during that time than there would be after he had actually got his men in the field to carry out the plans that he had already matured?

(Counsel for complainant objects to the question on the ground that it is based upon a false assumption of facts.)

A. Well, I think that if he spent particular time and was at particular trouble to provide money for this arrangement, that would be after my estimate of the value of his services. I was not taking that into account at the time, because I [495] simply did not know it. I should think that that would probably bring the work up to the same value as before. But while the work was actually going on the superintendency of the work would be more valuable, because it involved the expenditure of a much larger sum of money. But if, for instance, during this time they had been purchasing a plant for the manufacture of pipe, that would involve a very large sum of money, I think his services would be very valuable. But as a matter of fact, as I understand it, these preparations were not very extensive and did not require a very large sum of money,

and did not require the same degree of watchfulness as was required for the actual carrying out of the work. But if he was called upon to do a good deal of work and to furnish money and to make such preparations as that, I should judge it would not be unreasonable to suppose that his services during those three months were the same as the other.

Q. Whenever the work was commenced a considerable sum of money would necessarily be required to be furnished by the contractor, because he would not get any money until the estimates were furnished him by the city, and he would necessarily be required to furnish a considerable amount of money himself? A. Yes.

Q. Now, would the fact that he had to make preparations for that money as well as to organize a system by which he could carry on the work—would that have anything to do in determining what was the value of his services during those three months?

(Counsel for complainant objects to the question on the ground that it is based upon a false assumption of facts not warranted by the evidence.)

[496] A. You are supposing that he had to furnish all this money for the benefit of the partnership?

Q. Yes.

A. I should think that would increase the emoluments also; if he was furnishing the money as well as the work for both ends of the concern I should think that would necessarily increase his compensation.

Witness excused.

WILLIAM M. LADD is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by MR. R. MALLORY:

Q. State your name, age, residence, and occupation?

A. W. M. Ladd; 40 years old; banker; residence, Portland, Oregon.

Q. Were you acquainted with Lee Hoffman in his lifetime?

A. Yes, sir.

Q. What bank are you connected with?

A. Ladd & Tilton.

Q. What is the nature of your relations with that bank?

A. Managing partner, sir.

Q. Were you in that position in the bank during the year 1893?

[497] A. After January 6, 1893, I was managing partner; before that I was junior partner.

Q. You stated that you were acquainted with Lee Hoffman in his lifetime?

A. Yes, sir.

Q. I will ask you to state where he did his banking, if you know, during that time?

A. Ladd & Tilton had an account on their books, and had at that time in the name of Lee Hoffman, and one in the name of Hoffman & Bates, of which he was proprietor.

Q. Do you know of Mr. Hoffman having taken a contract from the city water works committee to manufacture and lay pipe for conducting Bull Run water from Bull Run to Mount Tabor about that time?

A. I understood he had a contract; yes, sir.

Q. I will ask you if you remember anything about the difficulty the water committee had in selling their bonds about the latter part of August?

(Objected to unless it be shown that the witness is conversant with the facts.)

A. They had difficulty in the year 1893 in regard to selling their bonds; the reason I know is because Mr. Failing came and talked with me once or twice in regard to the possibility of the water committee having to make their payments and not being able to sell their bonds, and wished to know if I would join with them in a pool to make the necessary advances to take care of the payments until the bonds should be sold.

Q. Can you state about when that was.

[498] A. No, I cannot give you the exact date; that was during the panic of 1893; I don't know just what time their bonds were sold in 1893; there was some bonds sold, I think, in September, 1893; all bonds, if I remember rightly, that were sold by the city during that time were taken by the purchasers with hesitancy; the city hall bonds were taken up piece by piece.

(Objected to as irrelevant and immaterial.)

Q. Go on and state the whole matter and your means of knowledge.

A. The only way I know in regard to the water bonds is from Mr. Failing talking with me in regard to the possibility

of their being unable to sell them, and then came the discussion of the question of selling in the fall of 1893 at 97½.

Q. Who was Mr. Failing, and what relation did he have to the water committee?

A. He was chairman of the water committee.

Q. This conversation that you had with Mr. Failing, do you remember whether it was before the 15th of September?

A. No, sir; I cannot place the date definitely.

Q. Now, I will ask you if you had any conversation with Mr. Hoffman in reference to arranging for funds to meet the bills that were likely to accrue on account of the work that he was carrying on in constructing this line of pipe—laying this pipe for conducting Bull Run water to Mt. Tabor?

(Counsel for complainant objects to the question so far as it relates to any conversation with Hoffman, on the ground that it is incompetent.)

Q. I understand that what you want to know is whether he came to get any money of me or to make any arrangements?

499] Q. That is what I want to know, if you had any conversation on that subject.

(Same objection.)

A. Yes, I had.

Q. State what it was.

(Same objection.)

A. As near as I can recollect, Mr. Hoffman came to me twice in regard to borrowing money, because he anticipated the possibility of the water committee not disposing of their bonds and be able to pay him the payments as they came due, so he wanted to be in a position to keep up with his sub-contractors; I told him he could have the money, but he never came for it; I think he did borrow money at different times of me, but I don't think they were sufficient sums to warrant being for this particular work.

Q. He did not call for the money, but made arrangements for it?

A. Yes, sir; he came and asked if he could have it in case he did not get it from the water committee, and I told him yes.

Q. Are you willing to fix the date of that conversation, or approximate the date?

A. Well, I cannot fix the date beyond this, that it would be as the date approached for receiving his money from the

water committee; now, Ladd & Tilton's books show that he received on the 21st, I think, of September, 1893, a large payment, which I think came from the water committee, because the check which went to his credit was on the First National Bank; I think that his books show that.

[500] Q. Now, do you remember if that conversation that he had with you was prior to that time?

A. Yes, I cannot place the date, but I feel certain that it was; and then there must have been some other time when they were in the same fix, because I recollect he came twice at least in regard to the matter.

Cross-Examination.

Questions by MR. L. B. COX:

Q. When was the other time, before or after this?

A. I cannot say, Mr. Cox; it was during the panicky season, when the bonds were hard to sell and get money for them.

Q. Are you able to determine that the conversation concerning which you first spoke took place prior to the 21st of September at all?

A. Yes, sir, I think so; the reason for my thinking so is that he came, as I said, twice, and there might have been more times, and if he could establish the question as to when the bond sale was made, it was prior to that time; it was then a question as to whether the sale would be made or not.

Q. Assuming that the sale of bonds was made on the 20th of September, 1893?

A. I think the sale of bonds was made on the 16th.

Q. On the 16th?

A. I think one of the conversations was prior to that time, possibly both.

Q. You are not sure about that? A. No.

[501] Q. Is it not a fact, Mr. Ladd, as far as your knowledge extends, that Mr. Hoffman was never in any apprehension of the shortage of money of the water committee until this September payment? A. That I cannot say.

Q. Can you say that he was—do you recall his ever having made any representations to you that he was in any difficulty and in fear that he would not get his money from the water committee except this payment which was made to him on the 20th of September?

A. I don't know that he said he was in any difficulty at all; my impression is that he came to me when he first made the contract, and talked about money matters in case he needed money to carry out the contract, he wanted to know if he could depend upon it; he was in the habit of asking for funds from time to time whenever he required money to carry on his bridge contracts; he always had collateral on deposit in our vault, so that that was there, and while I cannot place any particular date, I can remember his coming to the side counter there and talking with me in regard to the difficulty he anticipated in regard to the water committee not getting this money.

Q. Is it not a fact that one of the conversations that you had referred to the general one which Hoffman had with you at the commencement of the work, and the other was in regard to his apprehended failure to get his assessment on September 20th?

A. No, sir; I think he talked with me twice.

Q. After the first general talk?

A. Yes, sir.

Q. Let me ask you if you don't remember that in the winter 502] following September, 1893—that is, the winter of 1893 and 1894—that Hoffman's estimates were very small, and that it was at that time that he spoke to you about money?

A. I have no recollection of that; I might perhaps refresh my memory in regard to it by looking up the condition of his account, and soon.

Q. Did Hoffman speak to you twice about borrowing money for the same occasion?

A. I should not say for the same occasion, but for the same reason.

Q. For the same reason?

A. You might mean occasion and might mean reason.

Q. The same date, same occurrence?

A. Not on the same day; there were two particular times when it was not clear whether he would get his money from the water committee; it was his custom the day he got his money from the water committee, when he got his estimates allowed and he knew he would get his voucher, for him to make a check, so that very often funds that he received from the water committee were drawn upon the same time that he received it.

Q. Then it was in regard to these two estimates that he received, or ought to have received, that he spoke to you on these two occasions?

A. Yes, sir.

Q. You say it was customary with Mr. Hoffman to get these accommodations from you in his general business?

A. Yes, he would get them at times; I don't think that in late years he was very much of a borrower for his bridge business; he had some matters with Mr. Willis that he had some notes along at times; but I looked yesterday at his individual account, and there was in September a balance there of \$15,000.00 to his credit.

[503] Q. To his credit? A. Yes, sir.

Q. His individual account, or his Hoffman & Bates' account? A. His individual account.

Q. How was his Hoffman & Bates' account?

A. Something about \$13,000 at the commencement of the month, and run down possibly to about \$11,000.00; I did not pay special attention, but I just run my fingers across the line.

Q. Hoffman kept you secured on his general running account for accommodations made him during the period that he did business with you? A. No, sir.

Q. I understood you to say so.

A. I said he had collateral in the bank; he had securities deposited in the bank, in an envelope, but they were never put up as collateral for his general account because he never had any privilege of overdrawing; when he wanted any money, he would ask for it, and I never required him to put up any security for any specific loan.

Q. I misunderstood you; I understood you to say that he had collateral for any loan that he might need.

A. If I said that I did not intend to; he had securities in the vault, but it was not put up as collateral.

Q. I understand that all that passed between Hoffman and yourself at this time that he thought he would fail to get his pay on the 20th or 21st of September, 1893, was that he come to you and asked if in default of getting that estimate you would advance him sufficient money to carry his payroll and other expenses at that time, and you told him you would do so, and that he went off and never returned to follow the matter up.

A. I do not recollect that he said anything about pay-rolls [504] or anything of that kind; he said his needs might be for money to take care of his payments, but I did not go into the question of detail of what his payments were.

Q. To make his general payments?

A. He asked me if he could have money in case he needed it; I said, "Yes, sir," but he did not come back to get the money; I think he got his money each month.

Q. Is it a fact what took place between you on the 20th of September, that Hoffman put a check with you for deposit to his credit for a very much larger amount than he had outstanding?

A. I don't know whether they were larger than he had outstanding; he deposited a large check, \$60,000.00.

Q. It was very much larger than the amount he drew against it in the next thirty days?

A. I could not say without looking.

Q. Did you examine his books to see the condition of his account after the 21st of September?

(Objected to as not cross-examination.)

A. No, sir, I did not look to see whether in the month of October there was any payments made to him; I don't recollect what his balance run in October; the only recollection that I have of his balance is in the month of September it continued the same without any particular variation; Hoffman & Bates' account was increased on the 21st of September by a deposit of \$66,000.00, and that same day I think he checked for about twenty odd thousand dollars.

Q. That is the account to which I call your attention now; [505] was not the Hoffman & Bates' account always a credit account with you after the 21st of September as long as this work continued?

(Objected to as not cross-examination.)

A. I don't think that Hoffman & Bates' account ever showed anything else than a credit account; I do not think they were ever overdrawn, because he never overdrew his account; if he needed money, it was his custom to come and ask for the money and give his note for it; so his account was never overdrawn.

Q. You never loaned him any money after the 21st of September on his note?

A. I have not looked to see.

Q. You did not look to see?

A. No, sir.

Redirect Examination.

Questions by MR. R. MALLORY:

Q. I will ask you this, Mr. Ladd: When you spoke of the panicky times, will you state what is the fact about the habit of banks making loans generally as they had been doing at a time prior to the panic?

(Objected to as immaterial.)

A. What do you mean?

Q. Whether you were not restricting your loans during that time?

(Same objection.)

A. We were.

Q. What was the fact about people being able to borrow money when they wanted it out of the banks during that time?

(Same objection.)

A. Well, we commenced to restrict our loans when W. S. Ladd, my father, died, in January, 1893, and we did not loan very much money that year, because both of us boys wanted to go on a vacation, and we did not want to do much business, and we did not loan very much; of course, after the panic commenced, we did not loan any more than was absolutely necessary.

Q. I will ask you whether or not it was not true in the commercial world generally, and among banks, particularly in Portland, it was exceedingly difficult from the time the panic began until the remainder of that year—it was very difficult for people to get loans out of banks.

[506] (Same objection.)

A. Yes, sir, I think it was.

Witness excused.

WM. HONEYMAN is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by MR. R. MALLORY:

Q. Mr. Honeyman, state your name, age, residence, and occupation.

A. William Honeyman; age, 55; residence, 193 King Street, Portland, Oregon; occupation, hardware merchant.

- [507] Q. With whom are you connected?
A. Honeyman, De Harte & Co.
Q. What is your relation to that business—are you general manager? A. Yes.
Q. Is Honeyman, De Harte & Co. a corporation or a partnership? A. It is a corporation.
Q. Are you the president?
A. No, Mr. De Harte is president; I am vice-president.
Q. And manager. A. And manager.
Q. Were you acquainted with Mr. Lee Hoffman in his lifetime? A. I was; yes, sir.
Q. Did you know of his having been awarded the contract to manufacture and lay steel pipe for conducting the water from Bull Run to Mt. Tabor? A. Yes, sir.
Q. I will ask you if in the month of March, 1893, Mr. Hoffman spoke to you about signing as surety the bond that he was required to give to the city of Portland on account of this contract?
(Objected to as immaterial.)
A. I cannot say in the month of March, but he did in 1893 ask me to be surety on that contract. My impression, however, is that it was much later than March, still I may be wrong.
Q. Do you remember whether it was shortly after the contract was let?
A. It was shortly after the contract was let.
Q. The contract was let about the 5th or 6th of March.
A. Then it was in March. I remember I went down to San Francisco and it was cold. I remember there was snow going through the Siskiyou.
Q. I will ask you if you signed the bond.
[508] A. No, I did not.

Cross-Examination.

Questions by MR. L. B. COX:

- Q. Do you know of anybody else who did not sign it, Mr. Honeyman?
A. No, sir. Do I know of anybody who did not sign it?
Q. Yes.
A. Yes, I know lots of people that did not sign it.
Witness excused.

Thereupon the taking of testimony herein is adjourned until January 27th, 1896, at 10 A. M.

(Signed)

GEO. A. BRODIE,
Examiner.

Office of G. A. Brodie, Examiner, Portland, Oregon.

January 27, 1896, ten o'clock A. M.

At this time, pursuant to adjournment, appear the parties herein, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory of counsel, and thereupon the following proceedings were had, to-wit:

[E09] P. L. WILLIS is recalled as a witness for the defendant.

Direct Examination.

Questions by MR. MALLORY:

Q. State your name, age, residence, and occupation.

A. P. L. Willis; age, 57; Portland, Oregon; lawyer.

Q. Were you acquainted with Lee Hoffman in his lifetime?

A. I was.

Q. Do you remember on what day he died?

A. He died on the 24th day of July, 1895.

Q. Had you any business relations with Mr. Hoffman during his lifetime?

A. I did. I was attorney for Mr. Hoffman for a number of years.

Q. Were you his attorney prior to, at the time, and after the contract was let to him by the water committee of the city of Portland for the manufacture and laying of the pipe for conducting Bull Run water from Bull Run to Mount Tabor?

A. I was.

Q. Did you have any conversation with Mr. Hoffman concerning the matter of preparing estimates for bids for that work?

(Objected to as immaterial and incompetent.)

A. I did.

Q. Did you have any such conversation during the time that the bids were being prepared?

(Same objection.)

A. I did.

Q. Did you have any such conversation after the bids were prepared, as to the manner of conducting the work?

[510] (Objected to as incompetent.)

A. I do not know as I exactly understand the question. I talked with Mr. Hoffman freely and fully about the matter.

Q. I will ask you now to state what, if anything, Mr. Hoffman said to you in regard to the preparation of estimates and about making up bids on the work of conducting Bull Run water to Portland—the bids I referred to was upon estimates presented by the water committee for the purpose of having the work constructed.

(Objected to as immaterial and incompetent.)

A. He talked with me very fully about those matters at the time he said that the work was divided up by the committee into classes, and bids were to be received upon these classes separately, that he and Mr. McMullen proposed to get the work if they could, that they were both to submit bids on these various classes, but that it made no difference to which the work should be let; it was to be done by them together; that some of his bids were below those of Mr. McMullen and some of Mr. McMullen's were below his; the understanding was that if there should be no intervening bid between that of Mr. McMullen and Mr. Hoffman upon any particular class of work, the lower bidder would, if practicable, stand out of the way, and let the higher bidder take it—the parties bidding to get the contract at as high a figure as they could. Mr. Hoffman's bid was submitted in the firm name of Hoffman & Bates, under which he was doing business, and Mr. McMullen's was to be submitted in the name of the San Francisco Bridge Company, of which he was manager. The bids, as he stated to me, were arranged in that way with that understanding and were so put in. The whole work, I think, that was [511] awarded to them was awarded on one of Hoffman's bids; I think that when McMullen's bids were below Hoffman's there were other bidders below him.

Q. What, if anything, did he say as to their showing to each other their bid, and knowing the contents of each of them?

(Same objection.)

A. The bids were fully known to both; they were practically made up by both. The bid that was put in in Hoffman & Bates' name was really as much McMullen's bid as the one

put in in the name of the San Francisco Bridge Company; they were made up jointly between them.

Q. How about the San Francisco Bridge Company's bid?

A. It was the same in that respect as the other; Mr. Hoffman knew all about it. He told me in the beginning that Mr. McMullen's bid was lower and was raised at his suggestion, after conference with Mr. McMullen, and that there was one estimate on one portion of his bid which was raised at the instance of Mr. McMullen after consultation, my impression is, some \$13,000.00 on some class of work that Mr. McMullen thought that Mr. Hoffman had figured lower than was necessary, but the bids were all understood by both of them and mutually agreed upon.

Q. Now, did you have any conversation with Mr. Hoffman about this matter after the bidding was over and after the [512] contract was awarded?

(Same objection.)

A. Yes, about the bidding; I do not recollect that I had any conversation after the award until about the time that this trouble arose between Mr. Hoffman and Mr. McMullen.

Q. What trouble do you refer to?

A. That which arose before the commencement of this suit—shortly before Hoffman's death.

Q. Now, did Mr. Hoffman tell you anything about how their bids were arrived at—the amounts of them were arrived at, and anything about the estimates they had and who made them?

(Same objection.)

A. The estimates of Mr. McMullen he understood, and so stated to me, were prepared by the engineer of the San Francisco Bridge Company, a Mr. Catt, and Hoffman & Bates' bid was prepared very largely by Mr. Bush, Hoffman & Bates' engineer. That was the original preparation; then they compared them together, and he and Mr. McMullen sealed them, as they thought advisable and best calculated to secure them a good contract.

Q. Now, Mr. Willis, did Mr. Hoffman tell you anything about the matter of procuring funds for carrying on this work?

(Same objection.)

A. Yes, Mr. Hoffman was very much troubled about means

[513] for carrying on the work. His contract was let only a few months before the financial depression which struck us in July, 1893, and immediately after which it appeared almost impossible to raise funds. He told me Mr. McMullen was unable to furnish any money towards the prosecution of this work, and he was very fearful that he would be unable to raise sufficient funds himself, and indeed at times told me that he did not believe he could do it at all, and he put forth strenuous efforts, he told me, and some of this I was cognizant of, besides what he told me. He had an account for labor performed on some railroad work on the Sound, quite a considerable sum due him, that was admitted by the company whom the work was for, and another considerable sum that he claimed for force or extra work that was questioned by the company, and he, in order to secure funds and money for the preparation of this work, took the money which the company admitted, and abandoned his claim as compensation for extra work; it was only on that condition that the company would pay any sum, and he abandoned this claim—I think it was some \$5,000.00—that he claimed for force work which he abandoned in order to obtain about the same sum of money as I recollect it, upon the undisputed claim. That was for the purpose of having it to use in the prosecution of this Bull Run contract.

Q. Did he say anything about any efforts being made by him to get Mr. McMullen to put up the money?

(Same objection.)

A. Yes, he said he had called upon Mr. McMullen—that is, by writing—and I am not certain but he met Mr. McMullen and talked with him about it, but at any rate he had written several times asking him to put up money, and explained to him the difficulty that Hoffman was experiencing in the matter of raising funds, and insisted upon Mr. McMullen putting up half the money.

Q. Did Mr. McMullen tell you how much, if any, money he had himself advanced?

[514] A. I think he told me how much he had advanced, but the exact figures I would not undertake to state; my recollection is about \$15,000.00 that he had put in, and that he had made preparations to raise about the like sum in addition, though he afterwards told me that he had made preparations to raise

more than he actually used. That was owing to the fact that at one time the water committee had failed to make sale of some bonds upon which they calculated to raise money, and Mr. Hoffman had been depending upon that same calculation, and they feared they were not going to be able to raise that money—the water committee was not—and if they did not, then Hoffman would be short a very considerable sum on the payment of his men, and for supplies which he had agreed to make, and he made those preparations, but after that time, rather unexpectedly to Mr. Hoffman and seemingly to the committee, the bonds were disposed of, and the money was supplied by the committee.

Q. State what you know, if anything, from what Mr. Hoffman told you, or otherwise, when he was first advised that the bonds had been sold from which the money was realized to pay his September bills.

(Counsel for the complainant objects to the question as far as it called for an answer based upon anything the witness' personal knowledge, as being incompetent.)

[515] A. Mr. Hoffman talked with me about that matter, the day before it was announced in public prints here that the bonds had been sold, and on that day, in his talk with me, he expressed regret that the water committee had declined to order the work stopped on account of their failure to get the money; he preferred the committee would order the work to be stopped until they could be assured of the money, and I am confident from his talk on that day that he did not know the money was coming from that source. The next day it was announced in the public prints—I saw it in the "Oregonian"—and immediately after I arrived at my office in the morning, Mr. Hoffman came in and was in great glee over the fact that the committee had disposed of the bonds, and that he would get the money from them to go on with the work.

Q. What, if anything, did you ever hear Mr. Hoffman say in regard to the furnishing of a bond required of him as a contractor which he was required to give the water committee for the performance of the contract.

(Objected to by counsel for complainant as incompetent.)

A. He said that Mr. McMullen was unacquainted here and could not furnish a bond, and that he would have to put up bonds.

Q. I believe you were one of the sureties yourself?

A. I understand so; that is, I have been on Mr. Hoffman's bonds in a good many instances, and I think I was on this bond for this work.

Cross-Examination.

Questions by MR. L. B. COX:

Q. You are acting as the legal adviser of the present defendant in this case, Mrs. Julia E. Hoffman, administratrix of the estate of Lee Hoffman, deceased?

[516] A. I am in some matters.

Q. You have charge of the probate matters pertaining to the estate, have you not? A. Yes, sir.

Q. And you had acted as counsel for Hoffman for a number of years prior to his death? A. Yes, sir.

Q. And were the legal adviser of Mr. Hoffman in matters connected with the controversy between himself and Mr. McMullen and himself prior to the commencement of this suit?

A. Yes, sir.

Q. When did the conversation or the several conversations which you have alluded to between Hoffman and yourself in regard to the preparation of these estimates and bids for the work let by the water committee for bringing Bull Run water here to Portland take place?

A. It must have taken place shortly prior to the letting of the contract in the latter part of the winter or early spring of 1893.

Q. How did Hoffman come to be conferring with you about the matter at that time?

A. Well, he was talking the matter over to me as a matter of business. He talked his business with me very freely, both in reference to that and other matters.

Q. Were you advising him in regard to these matters?

A. Not in reference to making the bid; he knew more about that than I did.

Q. Did not he ask your opinion as to whether or not the bids should be put in in the way that he said they proposed to put them in?

A. No, sir; he knew no more about that than I did.

[517] Q. He knew about the matter of making estimates and putting in bids, but did he ask you if he and McMullen could bid in the way that he told you that they proposed to put in

the bid, as you have testified of one putting in a low bid and another a higher bid, and then dropping the low bid, and trying to get the work on the higher bid?

A. I do not think he asked my advice on any matter of that kind.

Q. How did he happen to be telling you about it—just as he would be telling anybody else he might be talking to about that?

A. I do not think he would have told parties generally. He relied upon my keeping what he told me in such a manner as not to be injurious to him. I do not think he would have told this generally.

Q. Is it not a fact that Hoffman was talking with you in regard to these matters as his confidential legal adviser?

A. Not particularly with reference to these matters, yet he would not have probably have talked these matters to me if that relation had not existed between us.

Q. Now, Mr. Willis, do you say that Hoffman did not ask your advice in any of these matters during the time that he was talking with you in regard to them?

A. Do you mean as to the legal effect of them?

Q. Yes.

A. No, I do not think he ever did.

Q. Did you express any opinion upon the propriety of him and McMullen bidding in the way that he outlined that they proposed to bid?

A. No, sir; I do not think I ever did.

Q. And he did not ask you anything in regard to it?

[518] A. I think not.

Q. Did not Hoffman state to you, or did not you know at the time these conversations were being had, that the bidder on any class of this work was required to deposit a certified check for five per cent. of the amount of the bid with the water committee, and this check would be forfeited to the committee if the bidder failed to make good the bid that he had tendered in case it should prove the lowest?

A. I think that I talked with Hoffman about it.

Q. You talked with Hoffman about it?

A. Yes.

Q. Where was McMullen at this time?

A. I think that McMullen was in Portland part of this time.

Q. Do you know whether these bids had been made or agreed upon as you say they were, at the time you and Hoffman were talking?

A. We talked about them before they had been fully agreed upon; they were under consideration at the time that we were talking about them.

Q. Now, during the course of any of these conversations had the amount of the bids been agreed upon?

A. I think Mr. Hoffman told me as to the principal, if not all the items, the amounts that had been agreed upon before the bids were opened.

Q. Now, then, did Hoffman tell you what those amounts were? A. I think he did, yes.

Q. Now, will you state to us how you figure out or how Hoffman figured out that by dropping the low bid on any of 519] these classes of work and forfeiting the five per cent. check which was deposited and taking the job on the next higher bid, that Hoffman and McMullen would not have suffered a loss upon every single proposition advanced?

A. Mr. Hoffman's statement about that matter was to this effect: that they could generally get rid of a forfeiture of that kind on some pretext; if it should turn out that they could not get rid of the forfeiture, and the difference between the two bids was more than the forfeiture, they could still make a profit on it; if the forfeiture was likely to be exacted from them, and amounted to more than the difference, then they would take the lower bid.

Q. Then they were setting a trap for the committee to catch them coming or going on the bids, is that it?

A. Well, they were seeking to do the best they could for themselves.

Q. Did McMullen ever tell you that he proposed to do any of these things?

A. I do not think I ever talked with McMullen at all. I think he came with Mr. Hoffman into the office at the time they signed that contract, but I do not think I ever had any talk with Mr. McMullen about the bid.

Q. Mr. Hoffman conferred with you a good many times while these estimates were in preparation?

A. Well, a number of times; I could not say a good many; he was in my office nearly every day, and about every time he came in after this work arose he talked about it.

Q. And he told you about these schemes he had in his mind about the water committee?

A. He told me what I stated here.

[320] Q. Did you ever discountenance it?

A. I never said anything to him about that matter; those were matters that he understood thoroughly about, and I never assumed to advise him; he never asked any advice and I never offered it.

Q. Hoffman told you that he and McMullen were partners in what work they could get from the committee in bringing this water here?

A. He told me that they were operating together, and gave me the facts from which I drew the agreement between them that they signed.

Q. That agreement was drawn after the bids had been offered and the award had been made to Hoffman?

Q. Now, did Hoffman tell you what their bids, if you term them such, on the work of manufacturing and laying steel pipe from the head works to Mount Tabor, were, and the amount of each bid?

A. Yes, I am quite certain he told me that.

Q. Now, there was no design on the part of Hoffman to drop the low bid in that case, and to attempt to get it on the other bid, was there?

A. No, I think the idea of that matter was to put McMullen's bid so much above Hoffman's that there would be no likelihood of doing that, but it was to make out that Hoffman's bid was very low, that was the purpose of it. The difference between those two bids, if I recollect, was some \$50,000.00 or more.

Q. You understood that from Hoffman?

A. Yes, sir.

[521] Q. Then it was in regard to these other bids in which the San Francisco Bridge Company might be the lowest that the San Francisco Bridge Company was to drop out and let the bids go to Hoffman?

A. Yes. I am not certain but there were other branches of the work in which Hoffman might have been dropped. I am not certain on the smaller branches about the amount of their various bids; I knew at the time, but I do not recollect it now.

Q. But at all events, the bid of Hoffman for laying the steel pipe was to go to Hoffman; there was to be no drop on that?

A. That is my recollection, that McMullen's bid at that time was to be so high on that matter that they did not expect but what there would be intervening bids between the two.

Q. Mr. Hoffman very fully unfolded his scheme to you in regard to that matter, did he?

A. Pretty fully, he talked to me very fully.

Q. When McMullen was here in the city of Portland?

A. He was here part of the time; I am not quite certain about all the time.

Q. You never had any such conversation with McMullen, and he never unfolded any such devices to you?

A. No, sir; McMullen never advised with me about the matter at all.

Q. And during all the time that Hoffman was laying before you the scheme that he had in his mind, you did nothing to discountenance what he was proposing to do to the water committee?

A. No, sir.

[22] Q. You say this bid of Hoffman for laying of steel pipe belonged equally to Hoffman and McMullen?

A. I think so.

Q. Then the bid was made jointly as the result of their joint judgment?

A. That is my understanding.

Q. Now, you say that McMullen required Hoffman to lower his estimate upon one item about \$13,000.00?

A. No, to advance his estimate.

Q. Advance his estimate? A. Yes.

Q. Do you know what that item was?

A. I am not certain; my impression is that it was some of the cutting.

Q. The excavation?

A. The excavation, I think.

Q. Is it not a fact that they made a cut on the work?

A. Well, I cannot say certainly about that, Mr. Cox; my impression is, though, coming to think about it, that he claimed it was a reduction.

Q. Now, is it not a fact, Mr. Willis, and did not Hoffman

say to you that McMullen required him to reduce the excavation \$13,000.00 instead of advancing it?

A. They reduced Hoffman's and raised McMullen's, that is the way.

Q. Now, is it not a fact that Hoffman told you that McMullen was the low man all the way through, and constantly required Hoffman to cut the estimates on different things and to make this cut of \$13,000.00 on the excavation, which gave this contract to Hoffman?

[523] A. My impression is that that is substantially correct; that the cut of \$13,000.00 was what put the bid on that class below the next higher bid.

Q. Had it not been for McMullen's participation in the matter, the contract never would have gone to Hoffman?

A. Not unless he had reduced his figures, that is my recollection of it; he told me that his figures as he had prepared them were higher than the next higher bid.

Q. Now, what did Hoffman say to you about his requiring McMullen to raise his bid?

A. Hoffman's idea was that it would be better for their joint interest to have McMullen's bid put up considerable, the exact amount I do not recollect, but my impression is that it was some thirty or forty thousand dollars, possibly more.

Q. What do you mean by McMullen's bid?

A. The figures that he had prepared, as I understand it, to put in his bid.

Q. That he brought with him from San Francisco?

[524] A. Yes, I think Mr. McMullen brought the figures with him.

Q. And the figures that McMullen raised were those which he brought with him from San Francisco and which had been prepared by Catt as Hoffman informed you?

A. That was my understanding, yes.

Q. Now, these conversations in regard to these estimates and bids took place at and before the time the bids were put in?

A. These that I have just been speaking of; I had conversations with him afterwards.

Q. Now, when did the conversation about these money matters and the conversation about McMullen putting up his part, and the conversation about the money coming to Hoffman from the railroad company on Puget Sound, and the con-

versation about the amount of money that Hoffman had advanced, and the conversation about the preparations made to make or procure other moneys, and the conversation about the city selling its bonds, all take place?

A. During the year 1893.

Q. What time of the year?

A. They all took place between February and October, 1893.

Q. Is it not a fact that no one of them took place prior to July? A. That is not the fact.

Q. What did Hoffman talk with you about before July?

A. He talked with me about the money matter that was coming from the railroad work that he had done on Puget Sound; that was before July, and I think it is probable that some of the other matters took place—about the bond matter.

Q. I did not ask you about the bond matter.

A. Well?

Q. When was it he talked with you about the railroad matter on Puget Sound?

A. He talked with me about that sundry times.

Q. When was the first time?

25] A. I cannot give you the first date; I have no data myself that would furnish it.

Q. Can you approximate it?

A. Well, I think the first talk I had with him about that railway matter was in the winter preceding—perhaps in the latter part of 1892, or early part of 1893—and I then prepared some correspondence with the engineer with whom he was dealing—the chief engineer—in reference to that matter upon his statement of the fact in relation to his claim for this extra or force work, but it was later and possibly after the financial trouble in July. But I am inclined to think that it was before that that he told me he had concluded to forego his claim for this extra work, in order to get the money that was due him on the other work.

(Counsel for complainant having already entered a general objection to all matters which took place prior to the execution of "Complainant's Exhibit No. 1," on the direct examination of this witness, subject to the ruling of the Court upon the materiality and admissibility of such evidence, offered by the defendant, appertaining to such time, now desires to say and have it placed upon record that this cross-examination as

to all matters or conversations between Hoffman and this witness at subsequent times are also to be taken subject to the ruling of the Court, as to the competency of the direct evidence upon such matters.)

Q. Is it not a fact now, Mr. Willis, that Mr. Hoffman reached this conclusion in regard to the railway matter on Puget Sound without regard to anything which McMullen might have done or might not have done?

[526] A. I do not understand that to be so, according to his statements to me.

Q. You say that Hoffman spoke to you about this matter prior to the crash in July?

A. I think he did, yes, sir. I know he spoke to me about that matter.

Q. I am talking about the matter of foregoing his disputed claim for the sake of getting his allowed claim.

A. Yes, I am inclined to think that was prior to July; I am not certain of that.

Q. You are quite positive about that, are you?

A. Not particularly; it is a good while ago, and I did not charge my memory as to dates.

Q. Do you remember the time that active operations on the work commenced?

A. I could not give you that date.

Q. Assuming that was in June, was not the conversation Mr. Hoffman had with you in regard to this matter in connection with the amount of money that he was required to raise as his part of the partnership venture without regard to McMullen, when he first spoke to you about drawing this money upon the railroad?

A. No; I am quite certain this conversation with me was that he had to make that sacrifice on account of McMullen's failure to make his payment.

Q. Assuming that the first call that he made upon McMullen was in August, what do you say?

A. If his first call for money from McMullen was in August, I should say this conversation was after that, because I think he had called upon McMullen for money and [527] McMullen had failed to respond before he made this arrangement.

Q. Now, do you know when Hoffman got that money from Puget Sound? A. I do not.

Q. Who was that company over there?

A. There were two concerns; I am not certain which one it was he got this money from. There was the Great Northern, and I am not certain whether it was the Oregon Improvement Company or another concern, called the Port Townsend Southern, a road down on the west side of Puget Sound.

Q. It is one of these three companies?

A. One of those three companies.

Q. Did Mr. Hoffman tell you at any time when he was talking with you about his anticipated difficulty in raising money that he had gone to Mr. William M. Ladd, of the banking house of Ladd & Tilton in this city, and asked him if he would let him have such money as he needed in case he could not get money from the water committee, and Mr. Ladd told him he could get it?

A. I think Mr. Hoffman told me about speaking to Ladd about money, but he expressed his fear that the call might be greater than Ladd would be willing to put up; he had a fear whether his collateral would not give out before he got enough money. That Ladd would require Hoffman to put up collateral when he borrowed money, and Hoffman was fearful that he would be called upon to furnish more money than Ladd would be willing to put up.

Q. How do you know that Ladd would require him to furnish collateral?

28] A. I do not know, except that Hoffman told me that was his anticipation.

Q. What did he tell you about it?

A. Exactly what he told me I could not say, beyond in a general way what I have said, that he would be expected to put up collateral with Ladd when he borrowed money from him.

Q. That was just assumption on his part?

A. I think it was based upon what he had done before. I had borrowed money there with Mr. Hoffman, and we had put up collateral before.

Q. You had put up collateral? A. Yes.

Q. What time?

A. We borrowed \$25,000.00 there once; it must have been six or seven years ago, I guess.

Q. Then when Mr. Ladd testified the other day that he

had frequently loaned Hoffman money on his account, and had never required collateral from him, Mr. Ladd was mistaken?

A. Well, if he said that he must have meant Hoffman alone, for when Hoffman and I borrowed money there together, we had to put up collateral.

Q. Hoffman did not tell you about the conversation he had with Mr. Ladd in which Mr. Ladd told him that he would let him have such money as he required without any conditions?

A. No, Mr. Hoffman did not tell me that.

[529] Q. Now, was it before or after he had made this deal with one of these companies of whom you spoke that you think that he told you he had spoken to Ladd about this money?

A. My impression is that it was after he had made this deal. I think he had raised what money he could on his own resources, before the time that he told me that he had spoken to Ladd about it. I cannot be very positive about these dates, because I did not attempt to charge my mind with them.

Q. Do you undertake to be positive, Mr. Willis, in regard to any of these matters that you have recited as having come to you from Hoffman?

A. Oh, yes, I am very positive about a large part of them.

Q. Just state now what you are particularly positive about.

A. Well, I am positive about his statement to me about the arrangement between him and Mr. McMullen as to their relations to this bid, and how they were arranging it in order to get as good a contract as they could with the city, and I am positive that he told me that he abandoned this claim against some of those companies on the Sound in order to get money on the undisputed claim from them. In fact, nearly everything that I have stated here with reference to conversations are entirely clear to my mind.

Q. Everything except the dates?

A. No, not everything. Dates, of course, are more uncertain than other facts, because they are more likely to slip one's mind.

Q. When was it that Hoffman told you that he had advanced about \$15,000 of his own money?

[530] A. I think that was about the time that he was in sore distress lest the water committee would not succeed in selling their bonds in September.

Q. In September he was telling you that?

A. Yes.

Q. You say at one time the committee had failed to sell bonds; when was that?

A. I do not think I said the committee had failed to sell bonds.

Q. I understood you to make that statement—the first statement that you made in regard to the subject.

A. That was not what I intended to say; the fact is, as I recollect the statement made by Hoffman with reference to that matter was that they had made arrangements to sell some of the bonds, and there was a question whether it would be carried out or not—whether the proposed purchaser would furnish the money and pay for the bonds. That, as I recollect it, was in September, 1893, along about the middle or after the middle of September, that it was determined that they would a few days before they did sell the bonds, but prior to that time, it was pretty well understood that they would not, and that time was the time that Hoffman was in so much distress, as I have stated, about his inability to raise funds to meet the obligations that would mature against him for that month's work, I think, or possibly, for the preceding month's work. On the next day it turned out that the bond purchaser had succeeded in raising the money and the bonds were to be taken.

[531] Q. Now, was it not at that time, Mr. Willis, and was not that the only time you heard anything about the inability of the committee to sell bonds or the anticipated inability of the committee to sell bonds?

A. No, I heard that talked over not only by Hoffman but by others, frequently.

Q. I am talking about this monthly estimate—the September payment—was not that the only payment in regard to which there was anticipated any difficulty about the sale of bonds?

A. I do not recollect of any other, Mr. Cox; I know it was doubted immediately after the financial crisis in July whether they would be able to sell any bonds, and it was talked about on the street, and was talked about by Hoffman to me, and was talked of by others on account of the stringency in the money market.

Q. Now, do not you remember that sufficient bonds had been sold prior to September 5th to carry the work up to that time and that was the first time that any difficulty was anticipated?

A. My impression is that they had sold sufficient to carry them up to that time before the tumble.

Q. Now, it was at that time and in connection with that September estimate that Hoffman told you that he had furnished about \$15,000.00, and had made preparations to raise more money?

A. Yes, I think it was in connection with that.

Q. What were the preparations that he had made?

A. He had raised what money he could from his private resources, and he had spoken to Mr. Ladd about getting more and if there were any others I do not now recall—I do not recollect of any others.

Q. Now, do not you remember that this is the fact that all Hoffman did say to you about raising more money was that [532] he had applied to W. M. Ladd in order to know from him if he could get what money he might need for his September payment?

A. No, he told me of the efforts that he had made himself. He had spoken to me frequently about that.

Q. I am talking about the September payment; at that time was it not that he told you about having to raise that money and the condition he was in, and that he had spoken to Ladd about it?

A. At that particular time?

Q. Yes. A. I cannot say certainly.

Q. You do not recollect of anything else that he said, though?

A. At that particular time I could not say for certain that it was that particular time that he mentioned the Ladd matter; but I think it was about that time; I have got that impression chiefly from the fact that he was very much distressed about his possible inability to meet his obligations that would mature very soon on account of this work.

Q. Do you remember the day of the month on which that occurred? A. What occurred?

Q. This last conversation that you had with Hoffman.

A. No, I cannot give you the date of the month. I do not

know, Mr. Cox, that I understand just what conversation you refer to.

533] Q. I refer to the one that you had with him about the trouble that he anticipated in getting money for his September payment.

A. Before it was understood that the bonds were sold.

Q. That is before the day it was published in the papers?

A. It was before it was published in the papers that they were sold.

Q. You do not recollect the day of the month?

A. No, it was the middle or last of the month.

Q. Referring now to the matter of giving this bond you say that Hoffman said that McMullen was unacquainted here, and that it would devolve on Hoffman to give the bond—Hoffman did not express reluctance to giving it, did he?

A. Not that I recollect of.

Q. He did not lodge any complaint against McMullen at that time about not giving the bond or part of it?

A. Not to me.

Q. Did not he with perfect willingness procure the sureties on this bond, so far as you know?

A. So far as I know, yes.

Q. Is it not a fact that you volunteered to sign the bond?

A. No, that is not the fact; I never exerted myself to go on that bond.

Q. How did you come to sign it?

A. I was asked to sign it.

Q. Then, when Mr. Swigert testified that Mr. Hoffman stated to him that you volunteered to sign this bond, either Hoffman or Swigert are mistaken?

534] A. That depends upon what they understand by volunteered. There was no application on my part to sign the bond, when Mr. Hoffman asked me to go on the bond, I signed it, either one or both of them might call that volunteering; and if so, they would not be mistaken; but if they meant to say that I had hunted Hoffman up, and suggested to him that I would like to sign his bond, they are mistaken; I did not volunteer in that kind of a way.

Q. Mr. Swigert testified that Hoffman told him that he, Hoffman, had called at your office, and that he was in some distress about getting a surety on his bond; that he said that

he had got Bates, but he did not know where he was going to get another surety, and that you thereupon said to him that you would sign his bond, and that you thereupon signed it.

A. The exact circumstances of the signing I cannot now narrate, but that I did not seek an opportunity to sign the bond I am very positive, but I signed it willingly when asked by Hoffman. I have signed his bond before, and I felt confidence in his doing what he undertook to do.

Q. You knew that McMullen was interested in that work?

A. Yes, sir.

Q. You knew that McMullen and he were associated together, did you not? A. Yes.

Q. You knew that McMullen had considerable experience as a contractor, did you not?

A. I understood that McMullen had had considerable experience in the contracting business.

Q. And in this line of work? A. Yes.

[535] Q. Now, is it not a fact, Mr. Willis, that you relied to a very large degree upon Mr. McMullen's experience and aid in prosecution of this work when you signed the bond?

A. No, sir, that is not a fact, I depended upon Mr. Hoffman; I was more intimately acquainted with him a great deal than I was with Mr. McMullen.

Q. You did not count upon Mr. McMullen?

A. Not in that matter.

Q. You had done business with Mr. McMullen?

A. Yes.

Q. You were personally acquainted with him?

A. Yes, sir.

Q. Did not you know this was a business in which Hoffman had had absolutely no experience?

A. Well, that depends upon what you mean by your question; if you mean that he had never constructed any pipe line for conveying water, I would say yes; if you meant that he had never had any experience in contracting business, I would say no.

Q. I mean work of this character—Hoffman had never put any water plant before?

A. No, I do not think he ever put in any water plant.

Q. You knew that at the time you signed the bond?

A. At the time I signed the bond I did not know of his having put in any water plant.

Q. You did know at that time that McMullen was an experienced contractor and had done work of this character?

A. I did not know that Mr. McMullen had ever put in any water plant. I understood that he was an experienced general contractor.

Q. Do not you know, and were you not led to believe and understand from what Hoffman said to you, that it was Hoffman's skill and information and judgment which had secured this contract?

A. I understood, as I before stated, that it was Mr. McMullen's suggestion that the estimate on the excavating be reduced some \$13,000.00 or thereabouts, on Mr. Hoffman's bid that enabled them to get that contract.

Q. Is it not also true that you understood that McMullen was a sort of conservation force on the entire business, and that Hoffman was cutting McMullen down on the estimate until they reached this \$13,000.00 item—that McMullen had been the man who had figured under Hoffman in the calculations that had been made all the way through?

A. My understanding was that McMullen's figures were below Hoffman's.

Q. Now, then, at the time you signed this bond you knew that it was McMullen's calculations and McMullen's estimate and McMullen's judgment that had prepared the bid?

A. I understood what I have already stated; yes.

Q. Yet you set no store by McMullen when you agreed to sign the bond?

A. I knew Mr. McMullen's affairs had been in the hands of a receiver not a great while before. His business was wholly in California, and his details were wholly unknown to me, and I depend solely on Mr. Hoffman.

Q. How do you know Mr. McMullen's affairs were in the receiver's?

[537] A. It was stated so in the public print.

Q. Before this time. A. O. yes.

Q. Are you quite positive about that? A. Yes.

Q. You had frequently gone on Hoffman's bonds in other instances, had you not?

A. Yes, in other instances.

Q. And you had no hesitancy in going on the bond at this time.

A. No, sir; I thought Mr. Hoffman would do just what he had agreed to do.

Redirect Examination.

Questions by Mr. R. MALLORY:

Q. Did Mr. Hoffman tell you anything about Mr. McMullen desiring to put in a bid for this work of manufacturing and laying the pipe, plates, etc., at the estimates that he had brought with him made by Mr. Catt.

(Counsel for complainant objects to the question as incompetent, irrelevant, and immaterial.)

A. I do not know that Mr. Hoffman stated that Mr. McMullen wanted to put in that bid. Mr. Hoffman's statement to me was that Mr. McMullen brought this bid with him to be considered in connection with the estimates prepared by Hoffman, and that it was generally considered by the two, and the result was to be such as agreed as their joint consideration of the matter. I did not understand that Mr. McMullen insisted upon putting in any bid at all, unless it was agreeable to Hoffman, after consultation, or that Hoffman insisted upon putting in any bid, unless it was agreeable to Mr. McMullen, after consultation.

Witness excused.

HENRY FAILING is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. R. MALLORY:

Q. State your name, age, residence, and occupation.

A. Henry Failing; age, 62; Portland; bank officer.

Q. Are you a member of what is known as the Portland Water Committee? A. I am.

Q. What position do you hold in that committee?

A. Chairman of the committee.

Q. How long have you held that position?

A. Since its organization. I think in 1885.

Q. What were the means adopted by the water committee of the city of Portland for procuring funds to construct the pipe for conveying water from Bull Run to Portland?

A. By issuance of bonds authorized by the legislature.

Q. I will ask you whether after the month of July, 1893, you had any difficulty in disposing of those bonds for the purpose of raising money for that purpose?

[539] A. Yes, we had considerable difficulty.

Q. State the circumstances generally about that, if you will.

(Counsel for complainant object to all this evidence as being immaterial.)

A. We advertised for bonds, and my impression is on advertising we failed to get any bids.

Q. What was your experience in regard to selling bonds to meet bills that fell due on the 20th of September?

(For the sake of convenience it is agreed that all questions touching this subject are objected to, on the ground that the evidence is immaterial.)

A. We found it difficult to get bids. In response to the advertisements for bonds we had a proposition from N. W. Harris & Company.

Q. State the facts that occurred about it, Mr. Failing, without being interrogated.

A. I am not sure as to the date, but I think it was in August. After correspondence we got a proposition from N. W. Harris & Company to take a certain number of bonds provided they had an option running, I think, three or four months for a certain amount per month at the same price.

Q. Did you make any sale under that arrangement prior to the month of September?

A. I think we made a sale in August under that arrangement.

Q. What was your experience in the matter of making sales to meet payments due to the contractors on the pipe line for [540] bringing water from Bull Run to Portland for the month of September? State as fully as you can.

A. Under the arrangement I spoke of with Harris they had an option to take 100,000 on or before October the 1st. We were, of course, very solicitous that they should exercise this option and I pressed them very hard, and, after correspondence, on the 16th of September they notified me to send \$100,000 in bonds, and I sent them that afternoon with orders for

delivery to them in such sums as they might tender. They had in August taken a few bonds. I recollect their taking 12,000 at one time—I do not remember the amount; the bond market was very dull; there was not much demand for bonds and we had to effect these sales as we could.

Q. Do you remember when you were first informed that a bond sale had actually been made and the money would be forwarded sufficient to meet your September payments?

A. I learned on the 16th by telegram that they would exercise this option for the bonds payable on or before the 1st of October.

Q. When did you first learn when the money would be actually paid?

A. I did not know just when the money would be paid until I was notified of its having been paid.

Q. When was that?

A. On the 20th of September—on the afternoon of the 20th.

Q. Had you any assurance until then that the money would be paid before the 1st of October?

A. I had not.

[541] Q. Now, in the meantime had there been any action on the part of your committee in regard to the possibility of your not being able to sell bonds to make the payments in September?

(Objected to as incompetent.)

A. I am not sure that any express authority was given by the committee, but I think the committee authorized the drawing of warrants from what money we had at our disposal—whether on express authority or not, warrants were drawn for 30 per cent.

Q. What money had you at your disposal?

A. We had a little remaining of the money on the former month and the current receipts from water rates.

Q. Do you know about the amount?

A. I cannot tell; my impression is somewhere about \$30,000 or \$40,000.

Q. How did you apportion that among the contractors—what per cent?

A. Equally to all of them. It was either 30 per cent or 40 per cent; I think 30.

C. Now, for that amount you say warrants were drawn?

A. They were drawn on the day of the maturing of the contractors' pay.

Q. That was the 20th of September? A. Yes, sir.

Q. Well, what, if you know, was done with the checks so drawn?

A. The clerk can tell better. I do not know whether I had signed the warrants or not.

542] Q. They were warrants; I called them checks.

A. Yes, warrants on the treasury.

Q. Just state what was done in regard to the transaction, if you remember.

A. I cannot tell whether I signed those warrants or not. Now, Mr. Mallory, my memory is not clear on that. I think it was pretty near the end of the business of the day, probably nearly three o'clock, that I got a telegram from Chicago, and I took this telegram and went to the office of the water committee, and instructed the clerk to draw a warrant for the contractors for the full amount of their pay.

Q. What office did you go to?

A. The office of the water committee; the clerk's office.

Q. Do you know whether warrants were drawn for the full amount?

A. They were, and the contractors were advised by telephone to come and get their money.

Q. That was the first day that you knew certainly that the money would be paid on the 20th of September?

A. Yes, sir.

Q. Did you know Lee Hoffman in his lifetime?

A. Yes, sir.

Q. Mr. Hoffman was one of the contractors for doing that work?

A. Yes, sir, for laying the pipe line.

Q. He was the contractor for manufacturing and laying of the pipe line from the head works on Bull Run to Mt. Tabor?

A. Yes, sir.

543] Q. I will ask you if you ever gave him any notice or ever had any conversation with him in any way about having the money to meet his claim on the 20th of September.

A. I do not think I ever had any conversation with Mr. Hoffman upon the subject, unless it might have been when he was called in at the meeting of the water committee.

Q. I had in my mind the meeting when I asked you the question.

A. I never remember of having any private conversation with Mr. Hoffman on the subject.

Q. What was the fact about their having a meeting of the water committee at which he was called in and this subject discussed?

A. I think I called a special meeting and laid the matter before the committee, probably to know whether we would give these further options on the bonds; I am not sure whether it was at that meeting or not. It was suggested that Mr. Hoffman be called in and the difficulty of getting the money explained to him. We thought it but fairness to explain to him the position the committee was in. I do not know whether I said anything to him upon the subject. I think Mr. Dolph spoke to him.

Q. Did you hear what was said?

A. Mr. Hoffman said he thought the committee, if there was any question about their not having the money, ought to give him instructions to stop the work.

Q. I will ask you to state as near as you remember what was said to Mr. Hoffman by Mr. Dolph in the way of the probability of having the money to meet the September payment. State as near as you can what was said to Mr. Hoffman.

A. I have no very distinct recollection as to what words were used; I only know that we told him the position just as I have described it to you now.

Q. How is that?

A. That we found it very difficult to place these bonds; that we had no assurance that they would be placed, and in answer to his talking about stopping the work I think he was told that it would be time enough when we failed on our contract that the payment did not mature until the 20th of the month, and the committee declined to give him any such order.

Q. You notified him of the uncertainty of getting his money?

A. Yes; I do not recollect the language, but it must have conformed to the circumstances as I have described them to you.

Q. Did you about that time, or about the 14th or 16th of

September, write a letter to Colonel Taylor in San Francisco on this subject? A. On the 16th?

Q. On the 16th.

A. Yes, the same day that I got the telegram from Harris.

Q. Have you that letter with you so you can refer to it?

A. I have a letter-press copy. That is not the letter book of the committee; this is my private correspondence. (Witness turns to a letter.)

A. (Con.) My reason for writing that letter was because I had been asked the month before by the Risdon Iron Works, 545] and received two or three telegrams from Tom Brown, cashier of the Bank of California, as to what assurance I could give that this money would be paid promptly. So to help him along and help him with his bankers, immediately after getting this dispatch from Chicago on the 16th I wrote him this letter: (Reads.)

"W. H. Taylor, San Francisco.

"Dear Sir: Referring to your letter of the 7th inst., which I acknowledged upon its receipt, I now beg to say that I have just received telegraphic advices that \$100,000 bonds will be taken and paid for on or before Oct. 1st. If they are paid for it will enable the committee to meet all of its obligations which will have matured on that date. I have sent the bonds forward to-day. I cannot, of course, make any guarantee that they will be paid for by the date named, but as they are very responsible people and have fulfilled all promises hitherto, I have no reason to doubt that the money will be forthcoming.

"I will telegraph to-day, and I did two or three days ago, about the necessity of having this money by the 20th. I think the bonds will be paid for before Oct. 1st. You are at liberty to use this letter with our friends and the Bank of California if there should be any need of doing so.

Yours respectfully,

"HENRY FAILING."

Q. At the time that letter was written you had no other assurance that the money would be paid than that these people had made good their promises before and taken the bonds when they agreed to? A. Yes, that is it.

46] Q. I think you have stated that your first intimation that the money had been actually paid was on the 20th?

A. Yes, sir. The telegram arrived at the telegraph office here in the afternoon about two o'clock and when I got to the office, I think about three o'clock, I found the telegram and I went over to the office of the water committee immediately.

Q. Did you have any conversation with Mr. Hoffman between the date of this letter and the date of your receiving the telegram that bonds had been sold—that is between the 16th and 20th of September?

A. Not to my recollection; I do not think I ever spoke to Mr. Hoffman about this work, except at that meeting and when he signed the contract, and once he came to me and complained bitterly about Colonel Smith. I do not recollect having any conversation in respect to the contract or upon any other subject except those I have mentioned.

Q. Do you know Mr. McMullen?

A. I do not, except I have seen him here.

Q. Did you know Mr. McMullen at the time the bids for this work for constructing this pipe line were opened?

A. Did I know him?

Q. Did you know Mr. McMullen at that time?

A. No, sir.

Q. Had you any knowledge or information at the time these bids were opened, or prior to that time, that Mr. Hoffman and Mr. McMullen were united in this purpose to bid on this work?

A. No, sir.

Q. Had no knowledge on that subject?

A. I had not. I never saw Mr. McMullen to know him until to-day, although I think I have seen his face.

[547] Q. The testimony in this case shows that there was before the committee a bid of Hoffman and Bates for manufacturing and laying the pipe of some \$465,000.00, and something over that, and another bid submitted by the San Francisco Bridge Company for \$514,000.00 and some odd dollars, and so there was also evidence that there were some five or six other bids. I will ask you if at that time you had any knowledge that the bid of the San Francisco Bridge Company, signed by McMullen was a mere sham simply put in for the sake of making a show.

A. No, sir.

Q. Now, was that bid with the others treated as being a bid in good faith?

A. It was treated by the committee in the same way. The bids were referred to the chief engineer for compilation. They were all treated alike.

Q. There was no knowledge on the part of yourself that there was anything about this bid any different from the other bids?

A. No, sir.

Q. It was accompanied by the usual certified check that was required by the advertisement for bids in the notification for bids?

A. I presume so; I do not recollect of any bids being thrown out as it would have been done if it had not been accompanied by a certified check, and I think it was considered with the other bids.

Q. I will ask you what was the condition of money matters here generally in Portland during the months of September and from July on for the remainder of that year.

A. Well, money was pretty tight, as we call it.

8] Q. What do you mean by being pretty tight?

A. Well, I mean it was pretty difficult at that time for a man to have to negotiate a loan unless he was a customer of a bank and the bank was under obligations to discount his favor, and by obligation I mean the ordinary obligation to loan money on good security to a depositor.

Cross-Examination.

Questions by Mr. COX:

Q. That difficulty prevailed not only at Portland, Mr. Failing, but at San Francisco and all over the United States, did it not?

A. Yes, I think in September, the time we are speaking of, that money was pretty tight all over the country.

Q. Your relation to other banks and with business generally would make you familiar with such matters throughout the country?

A. Yes. It was in response to either this letter that I wrote to Captain Taylor, or a dispatch in the month previous, he wrote me a letter thanking me for writing to his bank and said upon receipt of my dispatch the bank vault doors flew

open, and he was supplied what money he wanted. I suppose money was tight there also.

Q. What was the contract between Harris & Company and the water committee, and when was it made?

A. I cannot tell, Mr. Cox; I could probably ascertain if you want to know by reference to my letters.

Q. If you can do it I wish you would do so.

(Witness refers to the letter-book.)

[549] A. I do not appear to have anything here which will lead me to give the date that they first took these bonds. Mr. Dodge might be able to answer that; I can only say that we seem to have apparently drawn on them for \$50,000 bonds deliverable on the 5th of August on the 13th of July. You understand, Mr. Cox, that Harris & Company would make no contract for the payment of bonds on any particular date. We had to take them as they could place them, and in consideration of selling the bonds in July they were to take so many in August and so many in September and so many in October, and the September option was to be taken by October 1st, and on the 1st of August we telegraphed them that in consideration of their taking \$15,000 more bonds (that is, the week of the first of August), the committee would extend the option from the 5th to the 11th, inclusive, on the remaining \$35,000. That is, in consideration of their taking that before the time we extended the option on the \$35,000. They were to take \$50,000, but they broke down on that and asked if they would take \$15,000 right away if we would extend the option, and that was done. For that \$15,000 I had an inquiry myself and I suppose sent them a customer.

Mr. HULER, of San Francisco.—Q. Who were Harris & Company—purchasers or brokers?

A. Well, they were bond dealers.

Q. Brokers?

A. Well, they are brokers and dealers. Of course, they are supposed to be people of large capital, who have a certain amount of bonds and place them as they can.

Q. They were not buying these for permanent investment, however?

[550] A. No, I think not. It was difficult at that time to get people to carry these bonds, so I suppose they did not want to run

the risk so they took them as they could place them. On August the first, I wrote this letter confirming my telegram, and on August the 11th they seem to have accepted my further proposition. I have a telegram here (reads): "Telegram received. Proposition contained therein, bonds and draft for fifteen and twenty thousand dollars, respectively, go forward to Importers & Traders' National Bank to-day, two purchasers." This seems to have given an option changing the date. I do not know what change was made.

Q. Was that in regard to bonds for which payments were to be made on or before the 1st of October?

A. Yes, sir.

Q. I wish you would give us with particularity just what took place in regard to that issue.

A. This (referring to the letter) is an acknowledgment of their statement saying that they would push the bonds and accept the option on the first \$100,000 to be delivered at any time from September 5th to October 1st—will push sales. (Reads): "As I wrote before, please to push sales; we are somewhat in a dilemma about the portion of the work on our pipe line—amount due contractors on the 20th." This is under date of September 4th.

Q. Well, without going into details in regard to those matters, Mr. Failing, what I wanted to get at particularly was the nature of the option that you had with Harris touching the bonds which were to be delivered in September and upon the first of October; they did not have a contract that they would take \$100,000 of bonds in September and pay for them on or before the 1st of October?

551] A. They had an option to take them. We had no contract with them. They had an option to take them. We had no contract with them. They could take them or not just as they pleased.

Q. You had no information direct that they would take those bonds?

A. No. We did not have any confirmed contract until they sent this telegram on the 16th saying that they exercised that option and to send the \$100,000. Perhaps I am mistaken about that. I guess I am, because earlier in the month I think in this

letter that they exercised that option, and said that they would take \$100,000 of bonds by the 1st of October

Q. Now, when did you receive that information from Harris & Company?

A. That they would take this \$100,000 of bonds?

Q. Yes.,

A. On the 4th of September they say in their dispatch this: "We accept extension option next \$100,000 to October 1st; will push sales, etc."

Q. That was on the 4th of September?

A. Yes, we had their promise to take during the month.

Q. This \$100,000 of bonds and pay for them on or before the 1st of October? A. Yes.

Q. Then when you had your special meeting on the 7th of September, at which Mr. Hoffman was notified to be present, that information was before the committee? A. Yes, sir.

Q. And it was undoubtedly communicated to Mr. Hoffman, was it not?

[552] A. I do not know, but I suppose we described to him the condition.

Q. Now, is not this the situation-- that the question was not whether you would sell those \$100,000 of bonds during September, but the question was whether you would realize on them by the 20th so as to be able to pay estimates at that time

A. Yes.

Q. The question was whether you would get the money on the 20th of September or the 1st of October?

A. Yes, provided Harris exercised this option, but, as I have stated before, in August they took part of them, but they broke down and they asked for an extension, and asked if they would take \$10,000 or \$15,000 whether we would give them an extension, so we could not tell how much we could get from them.

Q. Still, you had reason to believe, and did believe, that you would get that \$100,000, did you not, before the 1st of October? A. Yes, I think so.

Q. You knew that to be a reasonable belief?

A. Yes, sir. It was a very critical time, of course, and we did not know what would happen. From this quotation in this letter which I read I knew it was a very critical condition of

affairs and they had asked for an extension of time in consideration of sending us \$15,000, and we did not know whether they would be able to take these bonds before October 1st or at any later date.

Q. That is, they might not.

A. Yes, they had failed before, and of course we did not know and we could not tell, just as I wrote Captain Taylor.

Q. At the same time when this special meeting was held on 53] the 7th of September it was the understanding and expectation of yourself and the water committee that you would have \$100,000 in by the 1st of October?

A. I do not recollect anything being said on that subject.

Q. Do you say it was your understanding and expectation that you would have this money in during September?

(Question objected to as incompetent.)

A. I was hoping so; yes.

Q. Was not that communicated to Mr. Hoffman at the time he attended on this committee on the 7th of September that there was a doubt about getting his money on the 20th, but it was expected to be in by the 1st of October?

A. I cannot say that.

Q. Well, your understanding is that the exact situation was communicated to Mr. Hoffman?

A. I am quite sure the general situation was explained, but he may not have been told exactly the correspondence. There was some doubt about his getting his money on the 20th.

Q. Did you communicate with Mr. Hoffman by letter or messenger, or otherwise, at the time you sent your letter to the Risdon Iron works on the 16th of September in regard to the same matter?

A. No, I am quite sure I did not, because, as I have said, I have no recollection of having any conversation with Mr. Hoffman in regard to the matter.

Q. My question is whether you addressed him a letter similar to the one you addressed to the Risdon Iron Works and sent it by messenger.

54] A. No, sir; I have no recollection of sending him a letter by messenger.

Q. As a matter of fact the money did come in on the 20th of September, and these estimates were paid in full on the succeeding day.

A. Yes, sir; I think on the same day I signed the warrants—on the afternoon of the 20th.

Q. In the matter of taking these bids by the water committee, Mr. Failing, the committee was advised by its chief engineer, was it not, as to the probable cost of doing this work?

A. Yes. We had got an estimate.

Q. You had an engineer whom you felt satisfied was competent to advise you in regard to the matter?

A. Yes, sir.

Q. The work of making these cost estimates was referred to him and he made them, did he not?

A. Yes, sir.

Q. What did the committee do in regard to these bids when they were submitted to the committee and opened?

A. Referred them to the engineer.

Q. Now, is not that all the action the committee took on the bids when they were first opened?

A. That is my recollection. I think now that they authorized the contract to be entered into with the lowest bidder on the certificate of the engineer. I am not sure about that Mr. Cox; that was the usual method.

Q. It is a fact, is it not, that the committee had reserved the right to reject any and all bids without assigning cause?

[555] A. Yes, sir.

Q. You probably did not authorize any contract until you had heard from your engineer?

A. The records will show that.

Q. If there was anything of that sort done the records will show it?

A. If there was any authority given the chairman to execute a contract the records would show it. Of course a contract was entered into and I would not have done it without authority.

Q. The contract in question was entered into on the 10th of March, and the bids were opened on the first of March. Now, I will ask you this question Mr. Failing, whether the water committee, as a committee, ever undertook to make a comparative statement themselves of these bids that were submitted for the manufacture and laying of this pipe from the head works to Mt. Tabor.

A. Well, I do not know hardly how to answer that question in a direct way, but my impression is that that appears upon the computation made by the engineer.

Q. Then the committee was guided by the estimate of the engineer in regard to the proper cost of this work without regard to the amount specified in the bids that were received?

A. I do not know they were guided by the proposals.

Q. Well, let me put the question to you this way; if all these bids had been in excess of the engineer's estimate appreciably, the committee had the right, and would have exercised it, of disregarding all the bids?

[556] (Objected to by defendant as purely speculative and not cross-examination.)

A. I suppose if the bids according to the engineer's estimate were very exorbitant the committee would have rejected them.

Q. They had that power? A. Yes, sir.

Q. How, then, is it not a fact that the only bid which was given consideration by the committee to any extent whatever was the bid which was reported back by the engineer as being the lowest bid?

(Objected to as incompetent, immaterial and irrelevant and not cross-examination.)

A. Well, I do not know, Mr. Cox; I have an impression that the bids were considered. That is my impression. I am not sure, but it took a pretty close computation to decide.

Q. Close computation?

A. Computation, yes, sir; considering the kind of work that they were pretty close together. That is the impression that I have. I am not able to testify to the facts, it is so long ago.

Q. Now, do not you remember this much, Mr. Failing, that a tabulated statement of all these bids was prepared and published?

A. I know it was prepared; I do not know whether it was published.

Q. I show you a published schedule of bids; did you see anything of that character?

(Objected to as incompetent, immaterial and irrelevant and not cross-examination.)

(Handing witness a public document purporting to be a tabulated statement of bids.)

[557] A. Yes, I think I recollect seeing this, but the report of the engineer to me was in writing.

Q. On the bids? A. Yes, sir.

Q. Now, what I want to get at is just this: you never saw that until after the engineer had returned his report, did you?

A. I did not.

Q. You think not? A. I think not.

Q. Now, is it not a fact that the engineer took these bids when they were referred to him as you have testified, and that he went over the ground and reported to the committee the party who was the lowest bidder on each class of work for which proposals had been submitted, and the amount of his bid?

(Counsel for defendant objects to the answers as immaterial and not cross-examination, and objects to all the questions that have been propounded to the witness on that subject upon the same ground.)

A. I think that is the fact.

Q. And the engineer did not make such a comprehensive statement in the first instance as that embodied in the publication?

(Counsel objects to the question as immaterial, incompetent and irrelevant, and not cross-examination.)

A. I do not know.

Q. Now, is it not a fact that the committee acted upon the report of the engineer, who certified to the committee the lowest bidder, without any consideration on the part of the committee in regard to the other bids for the same class of work?

[558] (Objected to by counsel for defendant as incompetent, immaterial and irrelevant, and not cross-examination.)

A. I do not think that is the case, Mr. Cox.

Q. Will you explain, then, what the committee did do?

A. Well, I cannot state what occurred there, but I think it is a usual thing—I have always done it when bids for bonds or any other matter are received—I generally have my pencil by me and I put down the bids as they are read, and I read them myself and put down the price, and I have a general idea in my mind who is the lowest bidder. Where there was different classes of work and bid on in different shape, as, for instance, if some would bid a lump sum and another would bid so much a yard, I would have to make an estimate to get the

approximate cost. I do not know whether anything of that kind occurred or not. I certainly do not think the committee, regardless of what the other bids were, awarded the work to Hoffman & Bates without being satisfied in some way that their bid was the lowest. I never saw any such evidence of carelessness as that.

Q. Now, in making your annotation in regard to the schedule of bids you must have made it from something that satisfied your mind? A. Yes.

Q. And it needed no computation to determine whether the lowest bid was a good bid? A. No.

Q. You looked to the advice of your engineer, did you not, to determine whether the lowest bid was a proper one?

A. That is, a reasonable bid?

Q. No, whether it was a good bid for the work according to the cost price of the work. A. Yes.

[559] Q. And you simply took these figures down yourself to determine whether or not the engineer's report agreed with your own notation of what had taken place?

A. Yes, sir.

Q. You did not, Mr. Failing, for the purpose of determining whether the bid submitted in the name of Hoffman and Bates was a reasonable bid as to the cost of doing this work, compare it with the bids of the San Francisco Bridge Company or with other bids, did you?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

A. As to whether it was a reasonable cost or not?

Q. Yes.

(Same objection.)

A. I do not recollect just who the bidders were, but whoever they were they were taken down and I examined the gross sum of the work, and saw it and how it stood relatively, and which was the lowest.

Q. You have not quite answered my question.

(The question beginning, "You did not, Mr. Failing, for the purpose of determining etc.," was read to the witness by the examiner.)

A. I do not think I did.

Q. Now, I will ask you, Mr. Failing, if you were in any degree influenced as to the propriety of accepting the bid of Hoff-

man & Bates by the fact of the bid that was put in by the San Francisco Bridge Company, or in any other name, for the manufacture and laying of this steel pipe?

(Objected to as incompetent, immaterial and irrelevant, and not cross-examination.)

[560] A. No, I do not think it had the slightest influence with me. I did not know who the San Francisco Bridge Company were

Q. Then the fact is that you did not, so far as you were concerned, undertake to determine on the merits anything about any of these bids when they were first submitted and opened by the water committee? A. No.

Q. The bids were opened, listed and referred to the engineer? A. Yes.

Q. And the engineer made up his report as to the lowest bidder, and upon the submission of the engineer's report the award was made?

(These questions are all objected to by counsel for defendant as immaterial, incompetent and irrelevant, and not cross-examination.)

A. I think that is correct.

Q. Do you remember now, Mr. Failing, what the bid of the San Francisco Bridge Company, or of any other bidder except Hoffman and Bates, was on the manufacturing and laying of steel pipe? A. No, sir.

Q. Did it make any impression upon your mind whatever?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

A. No. I cannot remember.

Q. I wish you would state who were the members of the water committee on the 1st of March, 1893, if you can do so.

A. I do not know whether I can repeat all their names, but I can a part of them.

Q. Give as many as you can easily call to mind.

[561] A. Mr. C. H. Lewis, C. A. Dolph, J. Lowenberg, H. W. Corbett, R. B. Rapp, Mr. C. H. Hill—I think he was a member then—and C. H. Rafferty.

Q. Mr. S. G. Reed was one, was he not? A. Yes, sir.

Q. Now, I will ask you, Mr. Failing, if these gentlemen were not all gentlemen of large and varied business experience.

(Question objected to as immaterial and not cross-examination.)

A. I think so—as a class they were.

Q. You understood and they understood, so far as you know, did you not, from what transpired between them and yourself, that the committee was protecting itself on this matter of bidding, and was looking out for its interest, and expected the contractors to look out for their interests?

(Question objected to by counsel for defendant on the ground that it is immaterial, incompetent and irrelevant, and not cross-examination.)

A. The committee was trying to protect the interests of the city in every respect.

Q. And you expected the people who were submitting these bids to take care of themselves?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

A. Yes, sir.

Redirect Examination.

Questions by Mr. R. MALLORY:

Q. Mr. Failing, I want to ask you something concerning [562] this acceptance of the option referred to as having been made on the 4th of September; as I understand it, Harris had an option from the committee to buy certain of these bonds each month? A. Yes.

Q. Under the original arrangement he had to purchase them by the 20th of each month so as to furnish you the money by that time, did he not?

A. No, I think not. I think the dates were different. This is evident from the extension of this option if he took so many more in August. I have not the correspondence which will show that, but I think it is a fair deduction from this correspondence that I have that he could not meet the former option and asked us to extend it to October 1st in consideration of his paying so much in August.

Q. Now, what option do you refer to?

A. The option of the 4th of September.

Q. And to extend it to the 1st of October?

A. That was the money that we should get by the 20th of September.

Q. When should it have been paid if paid according to the original understanding?

A. I would have to look that up; I cannot state.

Q. Was not this extension of the option on the 4th of September a mere extension to them of the right to take the bonds by the 1st of October? A. Certainly.

Q. Then when you extended that option that was not in any sense an actual sale of the bonds?

A. No, that option was not exercised.

Q. I understood from Mr. Cox, and I think Mr. Cox so understood from what you said, that it was an absolute sale.

A. Let me see the language of this letter. (Witness examines his letter book.)

A. (Con.) I do not see anything in this letter to make it a firm proposition that they were to take the \$100,000. Of course, they say they will accept the extension of the option on the next \$100,000 and will push sales to October 1st.

Q. Now, I understand from the form in which Mr. Cox put his questions and the way in which you answered them that there was an actual sale of \$100,000 of bonds, and that the money was sure to come on the 1st of October; did you mean to say that?

A. I did think probably I did give currency to that idea, but I do not think it is justified by what I see in this letter.

Q. Now, then, was the letter of September 4th or the dispatch of September 4th anything more than a statement that they would still take the bonds if they could do so, or if they chose to do so by the 1st of October under that agreement?

A. Yes, sir, that was it.

Q. So when Mr. Hoffman was before the committee on the 7th of September the only thing that you could have communicated to him on that subject was that these people had had their option extended to the 1st of October, and might decide to take the bonds?

(Question objected to as leading.)

A. That was all that could have been said, yes.

Q. I will just ask you if you can state from memory when you made this first contract with Harris.

34] A. I cannot.

Q. Can you state within a month or two of what time it was?

A. There cannot be any mistake about that; the records will show.

Q. The records of what?

A. The records of the water committee. I would not do anything unless it was expressly authorized by the committee, except this dispatch of September 2nd, and that was after consultation with some of the members of the committee.

Q. Can you state in a general way what was the nature of your agreement with Mr. Harris about the sale of these bonds?

(Question objected to as incompetent.)

A. My impression is that the first bonds they took were either in July or August, and they agreed to take so many bonds, I think \$100,000, and pay for them during certain months, provided they could have the option of some further bonds. These bonds were taken in October and November, and I think up to December. From time to time the market grew worse, and of course they had failed in selling them. They had agreed to take some, and it was postponed in consideration of their taking \$10,000 or \$15,000. It was postponed until the next month, and that was one of the reasons why we had no assurance that that might not be repeated in September.

Q. The explanation of the option, as I understand you, is this: that they had an option to take so many bonds within a given time, and if they did not exercise that option within that time then they could not get the bonds; that you had disregarded their agreement; suppose they had agreed to take \$100,000 of bonds by the 5th of September—now, if they did not take those bonds by the 5th of September you would not be obliged to sell them the bonds, but might sell them to somebody else?

A. Yes.

Q. Now, the object of this extension on their part was to hold the option so they could take the bonds by the 1st of October.

A. Yes, sir.

Q. That was the purpose of the extension?

A. Yes, sir.

Q. What I want to know is, whether the extension of the

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option as suggested in the dispatch that you have just read, and which you say was confirmed by the committee, did anything more than extend to them the option to take the \$100,000 in bonds that they should have taken by the 5th of September to the 1st of October.

A. They had no confirmed contract on any of these bonds. They had the option to take them or not, but on the 16th of September, when they telegraphed us to ship those bonds, we supposed that was an exercise of that option.

Q. But up to that time you did not suppose there had been any exercise of the option?

A. No, or else we would not have had this talk with Mr. Hoffman, and we would not have been on nettles ourselves.

Q. Then at the time Mr. Hoffman was before the committee, on the 7th of September, you did not know and the committee did not at that time know or understand that they had made sale of any bonds, so that you could be sure that the money would be paid by the 1st of October.

[566] (Question objected to as leading.)

A. No, sir.

Q. I think you have stated further that when Mr. Hoffman was before the committee you knew this money would be paid by the 1st of October; I think you did not answer the question.

(Question objected to as leading.)

A. Well, I think that I did say that, but I do not think the correspondence warrants that conclusion. I think the correspondence, in looking it over, shows that until we had received the dispatch of the 16th we had no such warrant to believe that we would get that money. As I told you, Mr. Cox, having kept their agreement pretty well, we thought they would do it by the 1st of October.

Q. The matter of extending that option on the 4th gave you no assurance that they would take the bonds—they still had the option and they would try to sell the bonds if they could?

(Question objected to as leading.)

A. Yes, that they would push sales; to show the nature of these transactions that the option was on their part to take the bonds or not, I wrote a letter in August to the Bank of California; (reads): "I have just received a telegram from the

Risdon Iron Works relative to the payments for material which they had to make on the 9th inst., and they wish me to give you some assurance that payment will be made on the 20th inst. I enclose copy of my reply, which I gave them the liberty to show. I think there will be more than 80 per cent [67] paid if the bonds are not taken." That is, for August. "I think the chances are reasonable that we will pay in full, although I cannot assure you of that fact." This was in August, and one reason why they had a warrant for asking an extension on that option to September was that in August they had anticipated the time beyond that. I see on August the 7th I telegraphed the Risdon Iron and Locomotive Works (reads): "Option on bonds deliverable east on the 18th extended from 5th to 11th inst." They wanted six days more to say whether they would exercise it or not.

Q. That is, whether they would take the bonds or not?

A. Yes, sir. (Reads): "Even if option not exercised will be prepared to pay all contractors 80 per cent, probably more. Show this to the bank."

Q. Mr. Cox, I think, undertook to make you say, Mr. Failing, by the form in which he put his question, that the committee received bids upon this work and handed them over to the engineer, who reported back to the committee which was the lowest bid, and the committee awarded the contract to the lowest bidder, and the committee took no interest in the matter but that you took down the amount of the bid just to see whether the engineer had made his figures right. Now, what is your best recollection as to what the committee did in regard to those bids?

(Counsel for complainant objects to the question, on the ground that it is a false assumption of facts not warranted by any interrogatory that was put to the witness, either directly or inferentially.)

A. I do not think Mr. Cox made me say that. I think that the committee followed out the usual course in obtaining and [568] disposing of the bids as I described in answer to Mr. Cox's interrogatory. I think that they were very solicitous that the work should be let at a proper price, and, as far as I know, the committee displayed as much interest in the matter as probably they would have done had it been their own.

Recross-Examination.

Questions by Mr. COX:

Q. Is it a fact, Mr. Failing, that the committee had an engineer at the time to advise them as to what was a proper price, and the committee relied on his advice?

A. I think to as great extent as the committee would naturally rely upon its engineer, or as any individual would on an estimate made by its own employee.

Q. You accepted this report and acted upon it, did not you?

A. I am not sure about the action of the committee—whether there was a reference to the engineer for tabulation.

Q. Would that be a matter of record? A. Yes, sir.

Q. Now, I think, Mr. Failing, we are in some confusion in regard to this Harris incident. In September, as I understand, the general arrangement with Harris was that he was to have an option covering three or four months, of which September was one, to take so many bonds and make payments for them on or about the 18th of the month in which the bonds were taken, and he was to advise the committee by the 5th of each month as to whether or not he would accept the option which had been tendered him, and on the 4th of September Harris advised you by telegram that he would close the option for \$100,000 of bonds to be delivered in September if the time of payment was extended from the 18th of September to the 1st of October; is not that the fact?

A. I do not know. I would have to go over this correspondence and look into it to see before I would be able to say that. I thought so at first, but now that my attention is called to what was done in August I have a little question about it.

Q. I will ask you to do this, Mr. Failing—to see if you can discover the correspondence with Harris relative to the bonds which were sold him in September, and couple that with the correspondence which you sent to him, so that we can have it in form of the record which took place between you and Harris in regard to this September transaction.

A. Yes. My impression is that the effect of this meeting at the time this matter was talked over with Mr. Hoffman on the 7th of September was that we understood here that Harris had until October the 1st to declare his option.

Q. How did Harris happen to wire you on the 4th of Sep-

September—

tember—was that in answer to any communication you had sent to him?

A. Yes, on the 2nd. That was the day before he had to notify us whether he would exercise his option or not.

Q. Now, under the standing arrangement with the water committee Harris was to inform you on or before the 5th of each month whether he would accept the option for that month? A. Yes.

Q. Then if he accepted the option pertaining to that month and so notified you on the 5th, it was incumbent on him under the terms of this general agreement to take these bonds and pay for them by the 18th also, was it not? A. Yes.

Q. Now, then, was not the effect of the communication made you from Harris on the 4th of September, anticipating by one day the time within which he was required to notify you under his general arrangement with the committee as to whether or not he would take the September bonds—to advise you that he would take these bonds for September, but wanted the time of payment extended from the 18th of September to the 1st of October at his option?

A. I do not think so, Mr. Cox, because it seems as though we had a meeting over that, and I do not think we would have had a meeting if that had been the case. It was simply a question whether we would give him that continuance.

Q. If you can discover this correspondence, Mr. Failing, I will ask you to do so, so you can throw more light on the question, if possible.

A. I will look over my correspondence to see if I can answer your question.

Witness excused.

71]

F. T. DODGE is recalled as a witness for the defendant.

Direct Examination.

Question by Mr. MALLORY:

Q. Mr. Dodge, you were present at the meeting on the 5th of September referred to by Mr. Failing? A. Yes, sir.

Q. I will ask you if you remember what were the terms of the contract between the water committee and Mr. Harris in regard to the sale of these bonds?

Mr. COX. Let me ask if the contract was in writing?

A. Yes.

Q. Mr. COX. I object to the question as incompetent.
(Question withdrawn.)

Q. I will ask you if you were present at that meeting?

A. I was.

Q. I will ask you if you remember anything that was said there to the effect that the money would be paid by the 1st of October, and if there was any contract by which they could get the money by the 1st of October?

A. I have no recollection of it.

Q. Now, when was the first time that you knew or were aware that the bonds had been sold and the money paid for the September payment?

A. On the 20th of September, about three o'clock.

[572] Q. Up to that time what steps had been taken looking to the payment of the bills that should fall due on the 20th?

A. Warrants had been drawn for 30 per cent of the amount due to the contractors. The money was divided pro rata by the committee and warrant drawn for each contractor—there were four of them—for 30 per cent of the amount due to each.

Q. Of whom Mr. Hoffman was one?

A. He was one.

Q. Were those warrants delivered?

A. They were not.

Q. And why not?

A. Because about three o'clock on the 20th Mr. Failing came into the water office and said, "Here is a telegram from Harris and Company"—pardon me, I do not recollect whether it was from Harris and Company or the bank, but he said, "Here is a telegram which will enable us to pay the full amount due to each contractor."

Q. At the time you were making out these warrants for the 30 per cent had you any information or understanding from Mr. Failing, or any one connected with the water committee, that the committee would be in funds on the 1st of October from the sale of bonds?

(Counsel for complainant objects to this testimony and all of it from this witness, on the ground that it is cumulative, the witness having already testified fully in regard to these matters.)

A. None whatever.

Q. When did you first notify Mr. Hoffman of the fact that the bonds had been sold and the money was on hand?

(Question objected to on the ground that it is cumulative, the witness having already testified in regard to this matter.)

3] A. On September 20th, about three o'clock, immediately after Mr. Failing received the telegram.

Q. Have you any knowledge in regard to the matters referred to by Mr. Failing as to the extension of this option and what it referred to—he referred to an option being extended to the 1st of October; what option was that, if you know?

A. My recollection is, according to the agreement he was to notify the committee on the 5th of each month whether or not he would take and pay for on the 18th of each month a certain sum in bonds. On the 4th of September he telegraphed asking an extension of the date from the 5th of September to the 1st of October.

Q. That was the date he was to declare his option?

A. That is my recollection.

Thereupon the further taking of testimony herein is adjourned until to-morrow, January 28th, 1896, at 10 o'clock A. M.

[Signed]

GEO. A. BRODIE,
Examiner.

Office of G. A. Brodie, Portland, Oregon.

January 28th, 1896, 10 o'clock, A. M.

At this time, pursuant to adjournment, appear the parties as before, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

4] F. T. DODGE resumes the stand.

Direct Examination (Continued).

Questions by Mr. MALLORY:

Q. Counsel for the defendant calls the witness' attention to a paper dated Portland, Oregon, January 8th, 1839, addressed to Frank T. Dodge, clerk of the water committee, Portland, Oregon, signed N. W. Harris & Company, by Mc-

Devitt, and a consent to the statement further down on the page by the water committee of the city of Portland, signed Henry Failing, chairman, F. T. Dodge, clerk, and I will ask you to state what that paper is.

A. It is the agreement between N. W. Harris & Company and the water committee of the city of Portland with reference to the purchase of water bonds.

Q. For bringing water from Bull Run to Portland?

A. Yes, sir.

(Counsel for defendant offers in evidence the paper last shown to the witness and the same is received and filed, marked "Defendant's Exhibit Z2," G. A. B., Ex.)

Q. I think you stated when you were called as a witness for the defendant in this case that at the meeting of the water committee on September 7th, 1893, Mr. Lee Hoffman was called in; this is referred to on page 301 of your book; I will ask you if you stated when you were before on the stand all that was stated or that your minutes show in regard to the communication between Mr. Hoffman and the committee at that time.

[575] A. I forget what I did say.

Q. I will ask you, then, now to state what your minutes do show as to what occurred in that particular.

A. My minutes show that the meeting was called by Chairman Failing (reads): "He stated that his reason for calling the meeting was in order that the committee might consider their financial condition and decide about making more contracts." Then there are two paragraphs which do not refer to this business at all. (Reads): "After a general discussion of finances the committee voted not to let any contracts for the reservoirs at present, and the clerk was authorized to return the certified checks which accompanied the proposals. As nothing would have to be paid for the submerged pipes before next year, it was voted that proposals for these be referred to the construction committee for investigation and report. Mr. Lee Hoffman, one of the principal contractors, was invited into the room and informed fully as to the financial situation. After some discussion, on motion of Mr. Lewis, the committee adjourned."

Q. That is all that appears on that subject, is it?

A. Yes; then it is signed by Henry Failing, chairman, and Frank T. Dodge, clerk.

Q. Now, have you any recollection any more fully than that record contains of what was said to Mr. Lee Hoffman at that time?

A. My recollection is that he was informed that there was no certainty of the committee being able to make payments on the 20th of September according to contract, as there was no certainty about receiving money from the sale of bonds or for bonds offered for sale.

[576] No cross-examination.

Witness excused.

WILLIAM M. LADD is called as a witness for the defendant.

Direct Examination.

Questions by Mr. R. MALLORY:

Q. In the course of your examination, Mr. Ladd, when you were before the examiner the other day, you stated that you understood that the bonds that the water committee desired to sell for the purpose of raising money to meet their September payments were sold on the 16th of that month; I will ask you if you understood that from Mr. Hoffman.

A. No, sir.

Q. From what source did you get your impression or your understanding?

(Counsel for complainant objects to the question as immaterial.)

A. You told me the day you were there asking to look over the account of Mr. Hoffman in conversation then in regard to the amount of money which the water committee paid him in that month. I understood from you that the bonds were sold on the 16th of September.

Q. That was the understanding you referred to in your answer?

A. Yes, sir.

Q. Had you any understanding of the date of the sale prior to this time?

[577] (Counsel for complainant objects to the question as immaterial.)

A. No. I cannot recollect. I think I stated in my testimony the other day when Mr. Cox asked me if I could fix the date of the conversations with Mr. Hoffman that it must have been prior to the time that they anticipated the sale of the bonds, but I could not tell this date without ascertaining when the bonds were sold.

No cross-examination.

Witness excused.

RUFUS MALLORY is called as a witness for the defendant, and being first duly sworn, testified as follows:

My name is Rufus Mallory; I am 64 years old; my residence is Portland, Oregon; occupation, a lawyer. I am one of the attorneys for the defendant in this case.

[578] I desire to state, referring to what Mr. W. M. Ladd has stated in his testimony, that he understood from conversation he had with me the day he stated, or the day before he was called as a witness here, that the bonds of the water committee which was desired to be sold to raise the money to meet the September payments due the contractors for constructing the Bull Run pipe line had been sold on the 16th of September, 1893—I desire to say that in that conversation I said to Mr. Ladd that Mr. McMullen in his testimony had referred to a letter, which, as I remembered it, had been received in San Francisco on the 16th of September by Capt. Taylor, written by Mr. Failing, at Portland, I think, on the 15th, and that Mr. McMullen and his attorney claimed that that was evidence that the bonds had been sold prior to the 16th, and that they therefore argued that Mr. Hoffman must have known that the bonds were sold on the 16th, the day on which he wrote the letter to Mr. McMullen, in which he proposed to terminate the partnership between them unless Mr. McMullen put up \$10,000. I did not state to Mr. Ladd that the bonds had been sold on the 16th; I only referred to the conversation I have recited, and from this he drew the inference, as he said, the bonds had been so sold.

(Counsel for complainant moves to strike out all the testimony of the witness as above given, on the ground that the same is immaterial.)

No cross-examination.

Witness excused.

G. W. BATES is called as a witness for the defendant, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. R. MALLORY:

Q. Where do you reside? A. Portland.

Q. What is your business?

A. Well, my business now is the banking business.

[579] Q. What has been your business heretofore?

A. Contracting business.

Q. How long did you follow the business of contracting, and where?

A. Well, I followed it here in Portland and vicinity for about nine years.

Q. What was the nature of your contract?

A. Bridge building principally.

Q. How extensive contracts were you in the habit of handling or did you handle?

A. Well, we have had considerable work; we built the Kennewick Bridge, and we built railroad bridges and highway bridges on the Coeur d'Alene branch of the Union Pacific—the branch from Tekoa to Mullen.

Q. What was the largest single contract that you had?

A. Well, I cannot tell you how much the largest was.

Q. Give us something near—approximate it.

A. Well, I guess it was about two hundred thousand dollars; I think something like that.

Q. Who was your partner?

A. Mr. Hoffman and Mr. Adler.

Q. You were acquainted with Mr. Hoffman in his lifetime?

A. Yes, sir; I was in business with him seven years.

Q. In the same business—contracting? A. Yes, sir.

Q. Do you know anything about the circumstances and conditions of this contract that he had for manufacturing and laying pipe for bringing Bull Run water to Mt. Tabor?

[580] A. Well, I do not know much about the details. I know of it in a general way only.

Q. Ever talked with Mr. Hoffman about it any?

A. Yes, sir.

Q. From whom did you ever learn of what he had to do with it?

(Objected to as incompetent.)

A. Well, I understood he was the contractor and manager of the contract, of course.

Q. For the whole contract?

A. Yes, sir.

Q. Did you ever have any conversation with him as to who furnished the money to do the work, or how it was paid by the city upon estimates?

(Same objection.)

A. Why, I understood that he furnished the money himself.

Q. Here was a contract which involved the amount of four hundred and sixty-five thousand dollars and a little more in the original contract, and there was other work done under it making the total amount something more than five hundred thousand dollars. Mr. Hoffman and Mr. McMullen were in partnership under an agreement that they should each furnish half the money to carry on the contract, and should share equally in the profits of losses thereof. Mr. Hoffman was to look after the work in Oregon, and Mr. McMullen was not to give it his attention and was not expected to. A bond for one hundred and forty thousand dollars was required by the city for assurance that the contract would be performed. This Mr. Hoffman had to furnish, Mr. McMullen not even signing the bond, or assuming any responsibility under it. Mr. McMullen had a [581] quantity, or the San Francisco Bridge Company had a quantity of plant, that had been in use in some contracts over on the Sound, at Seattle, consisting of camp, equipages, machinery for excavating, and a few horses which he furnished, of the value of somewhere from twelve to fifteen hundred dollars. He also, at the request of Mr. Hoffman, purchased, through his agents in New York, a hydraulic punch and a pair of shears for cutting iron, and at the request of Mr. Hoffman he also purchased, or rather ordered, in San Francisco some portable forges. He responded to whatever request Mr. Hoffman made of him in the progress of the work, in regard to employee and workmen, and provided tools for the work etc., but Mr. Hoffman had the entire control of the business, and all the responsibility attached to furnishing money to meet the bills that were due and all the liabilities which resulted from the ven-

ture. McMullen conducted his own business without reference to what was going on here. Mr. Hoffman, between the time the contract was let in March and the 1st of June, when the work of laying pipe actually began, had to make, and did in fact make, contracts for manufacturing the pipe, and he also had to make, and did make contracts for the hauling of the pipe from the place of manufacture to the place of its use. In the month of September, when his payroll and expenses would amount to something over twenty thousand dollars, he was notified by the city that there was no assurance that they would have any money to meet his bills on that occasion, and for the purpose of paying them and preparing to meet them, he made arrangements with parties to furnish him the money outside. He applied to Mr. McMullen to have Mr. McMullen 582] furnish his share of the money, which Mr. McMullen absolutely refused to do. Mr. Hoffman had, as I say, the whole care and responsibility of that work from the time the contract was awarded until it was completed in January, 1895. I will ask you to state, now, what in your judgment would be a fair and reasonable compensation for his services as manager of that work.

(Counsel for complainant objects to the question, on the ground that it presents an incorrect and incomplete statement of facts as shown by the evidence.)

A. Well, under the conditions, and I probably personally know a little more about it than there is stated in the question, I should judge a thousand dollars a month would not be any too much.

Q. From what you know yourself in connection with what I have stated.

A. Yes, sir; what I know personally besides.

Q. From what you know personally about it, what would you say would be a reasonable compensation?

(Same objection.)

A. The amount which I have stated.

Q. You were one of Mr. Hoffman's bondsmen, I believe?

A. Yes, sir.

Q. What do you know about Mr. Hoffman having any difficulty about getting his bond?

A. I do not think he had any difficulty, as far as I know.

Q. You do not know whether he had any difficulty in consequence of having to get the bond?

[583] A. No. He asked me if I would go on his bond, and I told him I would. I forget who the other party was.

Cross-Examination.

Questions by Mr. L. B. COX:

Q. You say you are a banker? A. Yes.

Q. What bank?

A. George W. Bates & Co., Albina.

Q. Mr. Bates, have you ever known of anyone occupying the position Mr. Hoffman occupied on this work—engaged in any similar work—during the time that you have been a contractor in the State of Oregon, getting anything like the salary which you say would be a fair salary to allow Mr. Hoffman for what he did. A. No, sir.

Q. What did you estimate your estimate on, then?

A. Simply on the responsibility of carrying on the work.

Q. You understood, of course, that Mr. Hoffman was a partner, and was to get a half interest in the proceeds of the job in addition to his salary?

A. I should judge so; yes, sir.

Q. Do you know of any other person occupying the position that Mr. Hoffman occupied in regard to this work who was ever allowed or paid one-half the amount that you say would be fair to allow Mr. Hoffman for his services?

A. Not personally; no, sir.

[584] Q. What is the largest salary you ever knew to be allowed or paid to a person occupying Mr. Hoffman's position in connection with this work—with reference to any similar position on any similar work?

A. Well, I do not know that I know of any.

Q. Do not know of any?

A. No, sir; I do not personally know of any.

Q. Now, of course, you were on very friendly terms with Mr. Hoffman during his lifetime? A. Yes, sir.

Q. On very friendly and intimate terms?

A. Yes, sir; I was associated with him in business for seven years.

Q. You went on his bond without any question?

A. Yes, sir.

Redirect Examination.

Questions by Mr. R. MALLORY:

Q. I want to ask you, Mr. Bates, if you, in all your experience, know of a case where a man occupied the same relation to a contract as Mr. Hoffman occupied to this? _____

A. No, sir.

Q. It was the peculiar condition that Mr. Hoffman occupied in this contract that makes you base your opinion upon as to the value of his services?

A. Yes, and having the whole responsibility for the payment of the men and all material.

Recross-Examination.

Questions by Mr. L. B. COX:

Q. It is on that assumption that you base your opinion?

A. Yes, sir.

[585]

Witness excused.

HENRY FAILING is recalled as a witness for the defendant.

Direct Examination.

Questions by Mr. R. MALLORY:

Q. You were asked when you were on the stand the other day to look among your correspondence to see if you could ascertain the exact condition of affairs between the water committee and Mr. Harris during the month of September; I will ask you if you have made such examination.

A. I have to the best of my ability.

Q. Will you now explain just what that situation was and all about this sale of these bonds for that month.

A. I think I can explain the apparent confusion in my own mind as to whether the option was to be exercised on a particular date or whether the bonds were to be paid for. When I was questioned by you and Mr. Cox, I was not sure as to when this contract was negotiated, and I think I stated that all this

was done in pursuance of a contract made sometime in July, for the sale of these bonds. It was two years and a half ago, and I had not looked carefully over the correspondence, and I had lost sight of the fact that during the month of September the original contract was modified and you might say a new [586] contract made. and when I stated, in answer to the first question, that the exercise of that option was on October 1st instead of September the 5th, I was correct; it was on an agreement for the extension of that portion to pay for those bonds. But subsequently, on the 13th of September, a proposition was made under which these bonds were agreed to be taken outright on October 1st, or by October 1st.

Q. Then the provision that you testified to having occurred on the 4th of September was a mere extension of the option?

A. Yes; under the contract as you have it, you will find that they were not bound to take any bonds, but they were to state on the 5th of the month whether they would exercise that option or not.

Q. Whether they would take the bonds that month or not?

A. Yes. When they could not see their way clear to do that they asked to extend that option to October 1st.

Q. That is the option?

A. Yes. The committee had no alternative, and I think the dispatch in which that was agreed to was read here in testimony; I think so. It was because of that, that on the 17th of September I called the committee together, and they were given to October 1st to say whether they would take any more bonds or not.

Q. That meeting of September 7th is the one that you called Mr. Hoffman before the committee?

A. Yes, sir. So the matter stood until the 13th. I have not the dispatch here, but it is copied in this letter. (Reads):

"Chicago, Sept. 13, 1893.

[587]

Henry Failing, Esq., Chairman Water Committee, Portland, Oregon.

Dear Sir: We telegraphed you on the 13th inst, as per enclosed copy as follows: We are finding it very hard to sell Portland water fives and get any premium for them at time when other bonds of similar grade are being sold for so much less. We have no orders for Portland Water bonds outside of one

hundred and fifty already paid for, a few of which we still have on hand unsold. Many offerings at ninety-nine of five per cent bonds of Eastern cities legal for Massachusetts savings banks make it necessary to meet the market to insure sales. Our N. W. Harris wires from Boston suggesting that in order that you may be sure of funds to meet your requirements that if you will make concession of $2\frac{1}{2}$ per cent off price of remaining bonds now under option to us making net cost to us ninety-seven one-half and interest, thus enabling us to compete with other bonds, and will extend to our unexpired options and deliveries for thirty days we will agree to take outright one hundred thousand before October first. Kindly wire reply, but please understand that if foregoing not accepted we shall go on and do all we can under present arrangement.

Your reply at hand this morning as follows: 'Your telegram received and proposition accepted. Important we should have as much and as quick as possible proceeds of one hundred [588] thousand to be taken outright before October first. Advise me about drawing or sending bonds, and as soon as possible telegraph me when payment may be expected.'

At present writing we expect to be able to wire in the course of a day or two (probably before this letter reached you) respecting the first additional shipment of bonds.

The above telegraphic correspondence is so full as not to require enlarging upon at this time. Considering the importance of the interests involved, your reply has come back to us quite as soon as we could expect, and we have to thank you for your promptness in this regard.

Yours truly,

N. W. HARRIS & CO."

Mr. Dodge has made memorandum in pencil at the bottom here (reads): "Read at meeting of committee September 19th, 1893, and action of chairman approved—Dodge."

Q. Now, then, in order that I may clearly understand you, I wish to put a question in this form; under the original contract Harris & Co. had an option to take bonds in any month, but must notify the committee on the 5th of the month that they would take the bonds for that month.

A. I think that was the terms of the contract, but I have not read the contract over lately.

Q. The option must be exercised by the 5th and paid for by the 18th? A. Yes.

Q. Now, on the 4th of September, you received a dispatch, as I understand you, indicating that they could not exercise [589] their option on the 5th and desired to have it extended until the 1st of October, and that option was in fact extended?

A. Yes, I have the dispatch here—that was on September 2nd that I sent that dispatch.

Q. Now, between the day that you received this dispatch asking for an extension of the option, and the 13th of September, the committee had no assurance that any bonds would be sold for that month, is that correct?

A. Yes. I do not know when the letter was written; the dispatch was sent on the 13th, and was received probably on the 14th.

Q. Up, then, to the 14th, the committee had no assurance that any bonds would be sold?

A. No, my reply was received in Chicago on the 15th.

Q. Then under their dispatch of the 13th you were then figuring that if you were to make a rebate of two and a half per cent below the par value of the bonds, they would take outright one hundred thousand dollars of bonds and pay for them by the 1st of October. A. Yes.

Q. The committee acceded to that request, and the bonds were to that extent sold? A. Yes.

Q. That information was communicated to them on the 15th?

A. On the 15th—at least I received it on the 15th. I have a copy of the dispatch here in my letter book. It is on the 15th. I have a letter that I received ordering us to ship the bonds; I have a copy of that letter that we wrote our correspondents in Chicago.

Q. I will ask you this question now, if you have had any conversation or communication with Mr. Hoffman after you received [590] this dispatch on the 13th and the 20th of September when the money was paid.

A. I think not. I have no recollection of ever talking with Mr. Hoffman anything about finances except at the meeting

of the water committee. But Captain Taylor depended upon me, as a friend, to do the best I could for him to help him get his money from the Bank of California, and I did not write to him until the afternoon of the 16th of September, when I got that dispatch, and I felt then that I was going to get that money sometime during the month.

Cross-Examination.

Questions by Mr. L. B. COX:

Q. Will you give us Harris' dispatch of the 2nd of September, Mr. Failing, please?

A. I have not got the dispatch; I have a letter of September the 1st, as follows (reads):

"Chicago, Sept. 1st, 1893.

"Henry Failing, Esq., Chairman Water Committee, Portland, Ore.

Dear Sir: We wired you yesterday as per enclosed copy, as follows:

"We agree take remainder third fifty thousand water bonds and pay for same on or before Monday, September eleventh, provided time to decide on next one hundred thousand extended from September fifth to October first for payment as sales [591] made on or before October first. We have favorable negotiations now pending covering all foregoing. Answer."

Your reply at hand as follows:

"Telegram received. Your proposition must be submitted to committee. Payment for remainder third fifty thousand on or before eleventh would answer, but the entire amount of next one hundred thousand will be required for contractors by twentieth September. Cannot you modify proposition and take certain amount from on or before eighteenth and also agree to take balance on or before October first, so that we can deal with contractors? I do not want to call committee together and present a proposition which they may not accede to and want to keep work progressing, if possible."

Yours truly,
N. W. HARRIS & CO."

That is my dispatch. I have the dispatch of September 2nd here; it is quoted in the letter of Sept. 2nd.

Q. Please read it.

A. (Reads): "Paid yesterday in New York for remainder third fifty Portland water bonds under option expiring yesterday; also paid twenty-five thousand to Portland Bridge Com. We desire favor water com., but unless our options can be extended cannot give encouragement taking more water bonds. We fear Portland officials fail appreciate condition eastern bond market. We are now urged to take under option to sell long Milwaukee and Long Omaha fives at par. Milwaukee bonds formerly sold three and three quarters interest [592] basis. If you will extend all unexpired options and deliveries thirty days, we will continue to push sales, giving you benefit proceeds rapidly as possible. Answer."

Q. Now, have you your answer to that dispatch of the 2nd?

A. Yes.

Q. Read it please.

A. (Reads): "Portland, Or., Sept. 2nd. N. W. Harris & Co., Chicago, Ill: Impossible to get committee together to-day; after consulting two or three members concluded to take responsibility of extending time from fifth inst. to October first on next one hundred thousand. Would prefer to consult full committee before extending remaining options and deliveries. We fully appreciate situation and your efforts. Wire me acknowledgment of this and state whether satisfactory.

HENRY FAILING,
Chairman."

Q. Will you read Harris' dispatch of September 4th, 1893?

A. (Reads): "Chicago, Sept. 4, 1893, Henry Failing, Portland: "Saturday's telegram just received this morning. Thomas (which was afterwards explained to mean thanks). We accept extension option next one hundred thousand from September fifth to October first, and will push sales best our ability leaving question further extensions should same be necessary for future consideration.

N. W. HARRIS & CO."

93] Then on September 8th they wrote the following letter to me (reads): Chicago, Sept. 8th, 1893. Henry Failing, Esq., Chairman Water Committee, Portland, Or. Dear Sir: Your letter of the 4th inst. at hand this morning and contents carefully noted. It is gratifying to us to be assured by extension of time as well as by your letter, that gentlemen like yourself and Mr. Corbett, and those associated with you, do appreciate the extraordinary financial conditions which are still so persistent in the East; and we desire to say that we think that we, in turn, in some measure, at least, understand the anxiety and desire of the water committee to be certain of the necessary funds to have the pipe laying go on without interruption to the end of the season. We shall bear it in mind as you suggest to notify you promptly of sales we may make, whether for delayed or immediate delivery, and note also that you will make deliveries on notification from us at any time and in any amount desired, in either Chicago or New York as we may request. Should we learn of anything which would seem likely to be of aid to you in shaping the policy of the committee towards the contractors, we will gladly communicate it to you promptly. Our Mr. N. W. Harris has recently gone east and will spend the next two weeks at our New York and Boston offices and we shall thus have the advantage of his counsel in the immediate field where bonds such as the Portland water bonds would in ordinary times find their principal lodging place, as well as the benefit of his experience, while in touch with the eastern monetary pulse, in forming an estimate as to the course of the market and financial affairs generally in the near future.

594] We thank you for laying before us so fully the problems immediately confronting the committee, and assure you we shall do our best to comply with your wishes.

Yours truly,
N. W. HARRIS & CO.

P. S.—By the way, the word which reached you from us by wire on the 4th inst. as "Thomas" was the operator's version of the word written at this end as "Thanks."

N. W. H. & Co.' ,

Witness excused.

The defendant here states that he rests.

Testimony for Complainant in Rebuttal.

PHILIP BEUHNER is called as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.**Questions by Mr. L. B. COX:**

Q. What is your occupation, Mr. Beuhner?

A. Contractor.

Q. With what concern?

A. Well, formerly with Wolff & Zwicker Iron Works.

Q. What now? A. Just myself alone now.

Q. When were you with the Wolff and Zwicker Iron Works?

[595] A. There as a partnership between the Wolff & Zwicker Iron Works and myself formed in March, 1893, I think.

Q. I will ask you to state if that concern had any contract with Lee Hoffman for manufacturing of steel pipe under a contract awarded to him by the city of Portland from the head works of the water system on Bull Run Creek to Mt. Taber.

(Counsel for complainant objected to the question, as immaterial and irrelevant.)

A. Yes, we had a contract for making the pipe.

Q. Where is that contract now?

A. I think it is downstairs now.

Q. In whose custody? A. Mr. Paxton's.

Q. Do you remember the amount of the contract?

(Counsel for defendant here enters a general objection to all this testimony concerning the contract with Wolff & Zwicker as immaterial and irrelevant.)

A. On the contract for manufacturing the pipe alone it amounted to, approximately, \$180,000.

Q. What time was that contract entered into? ;

A. It was entered into in March, 1893.

Q. How long did it last?

A. Well, until the contract was finished.

Q. You executed your contract for manufacturing the pipe?

A. Yes, we completed the pipe.

No cross-examination.

Witness excused.

[596] JOHN McMULLEN is recalled as a witness in his own behalf on rebuttal.

Direct Examination.

Questions by Mr. L. B. COX:

Q. I will ask you to state, if you know, what arrangement was made to do the work of hauling the pipe into position which was to be laid under the contract of Hoffman with the city of Portland.

(Counsel for defendant objects to the question as irrelevant and immaterial.)

A. There was a contract made with Cook and Kiernan to haul the pipe from east Portland and deliver it along the line at the trench.

Q. Was that contract carried out by them?

A. Yes, sir; that contract was carried out by them.

Q. Do you remember the amount of it?

A. Well, the aggregate amount of it was about \$36,000.

(It is understood that all this testimony is subject to the same objection made by defendant.)

No cross-examination.

[Signed]

J. McMULLEN

Witness excused.

ROBERT WAKEFIELD is called as a witness for the com-
[597] plaintant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. What is your occupation, Mr. Wakefield?

A. Contractor and builder.

Q. How long have you filled that position?

A. About six years.

Q. Whereabouts? A. In Portland.

Q. Did you know Lee Hoffman during his lifetime?

A. Yes, sir.

Q. Were you ever associated with him?

A. Yes, sir.

Q. In any business ventures? A. Yes, sir.

Q. Where?

A. Building for the Holladay Avenue sewer, and I was with him building the bridges on the Great Northern Railway.

(Counsel for complainant now desires it to be noted that the interrogatories propounded to this witness and all other evidence in rebuttal pertaining to matters which transpired between Hoffman and McMullen touching the work of bringing Bull Run water to Portland prior to the execution of "Complainant's Exhibit No. 1" are offered, subject to the ruling of the Court upon the evidence submitted by the defendant as to the materiality of such matters.)

[598] Q. Did you ever have any talk with Mr. Hoffman during his lifetime in regard to the procurement of the contract which was secured by him with the city of Portland for the manufacturing and laying of steel pipe in connection with McMullen's association with his? A. Yes, sir.

Q. I will ask you to state whether or not in the course of any of your conversations Mr. Hoffman said anything to you about how the contract had been secured.

A. Yes, sir.

Q. You may state what he did say.

A. He said that he would not have been in it only for McMullen, that is, the words he used, "He would not have been in it only for McMullen."

Q. Was anything said in regard to figures which had been made on the contract—estimates by one or the other of them?

A. Yes, sir.

Q. What did he say about that?

A. He said that McMullen made him come down between \$40,000 and \$50,000.

Q. You say that you were concerned with Mr. Hoffman in the bridges on the Great Northern? A. Yes, sir.

Q. What time was this?

A. The contract was signed July 30th, 1892. It was all arranged, I think, about thirty days previous to the formal signing of the contract, but Mr. Hoffman was in Alaska, which delayed the signing until his return.

Q. How long did it last?

A. I think it was finished in May or June, 1893. I should judge somewhere along there; I cannot tell exactly.

599] Q. Now, I will ask you to state, if you know, whether Mr. Hoffman had any other business at that time with the Great Northern? A. No, sir.

Q. Do you know whether he had any business with the Port Townsend & Southern Railroad?

A. He had none.

Q. Did he have any with the Oregon Improvement Company? A. No.

Q. In whose name did the contract with the Great Northern stand?

(Question objected to by counsel for defendant as immaterial.)

A. Hoffman and Bates and Wakefield.

(Counsel for defendant moves to strike out all the evidence of this witness touching his relations with the Great Northern Railroad as immaterial.)

Q. Who did you say the contract was with?

A. Hoffman and Bates and Robert Wakefield.

Q. That was yourself? A. Yes, sir.

Q. When, if you know, was settlement made with the Great Northern for the work which had been done under that contract—the final settlement?

(Objected to by counsel for defendant as immaterial and irrelevant.)

A. I do not know just when the final settlement was made. I disposed of my interest to Mr. Hoffman before that, and I do not know when it was made.

Q. When did you dispose of your interest to him?

(Objected to by counsel for defendant as immaterial and irrelevant.)

A. On the 13th of September, 1893.

600] Q. According to your knowledge had settlement been made with the Great Northern up to that time?

(Objected to by counsel for defendant as immaterial and irrelevant.)

A. I think not, unless it was made without my knowledge.

Q. I say to your knowledge had any settlement been made with the Great Northern prior to that time? A. No.

Q. How much was owing from the Great Northern on this contract at the time you made your settlement with Hoffman?

(Objected to by counsel for defendant as immaterial.)

A. Well, we claimed about \$12,000.

Q. Of what did that claim consist?

A. It consisted of, I think, about \$12,000 for a small bridge that we used and some bridges that had been washed out that they claimed they were not responsible for.

Q. Well, I will put it to you in another way—was there any agreement between yourself and Hoffman on the one side and the Great Northern on the other as to the amount of your claim?

(Question objected to by counsel for defendant as immaterial and irrelevant.)

A. Yes, sir.

Q. What proportion was in dispute?

A. Between \$4,000 and \$5,000.

Q. How much was allowed?

A. Well, I cannot say. After I sold out of course I took no further interest.

[601] Q. I mean while you were there; how much did you understand that they did not dispute?

A. There was \$12,000 altogether and between \$4,000 and \$5,000 in dispute, would leave about \$8,000, actually conceded.

Q. Now I will ask you if you know what those disputed items consisted of?

(Counsel for defendant objects to the question as immaterial and irrelevant.)

A. They consisted of a small drawbridge that we used, and there was one span that had been washed out that we claimed they were responsible for and they claimed we were.

Q. What amount was claimed for this drawbridge?

(Counsel for defendant objects to the question as immaterial.)

A. \$2,000 was the claim.

Q. What had been the cost and what was the value of that drawbridge?

(Counsel for defendant objects to the question as immaterial.)

A. Well, I put it into the firm when I went into the firm with Hoffman at \$500.

Q. What were the facts in regard to the loss of the span that went out—what took that out?

(Counsel for defendant objects to the question as immaterial.)

02] A. High water took it out. The company furnished the false work and the high water took it out, and we claimed that was the cause of the loss of the span, and they claimed we had plenty of time to have built it before the high water came, and that was the cause of the dispute.

(Counsel for defendant moves to strike out the answer of the witness as incompetent and immaterial.)

Q. What is the character of your work as contractor, Mr. Wakefield?

A. Well, almost all kinds of work.

Q. Enumerate some of the contracts you have had and been concerned in.

A. Well, I have done a good deal of work for the Union Pacific-- bridge building and trestle building, and I built the terminal depot here, and built the Cantalever bridge at Albany, Oregon, and built the bridge at Snohomish Slough.

Q. What is the amount of your contract for building the depot here?

(Counsel for defendant objects to the question as immaterial.)

A. It run about \$300,000.

Q. What was the amount of your contract with the Union Pacific that you had?

(Counsel for defendant objects to the question as immaterial.)

A. I suppose I did \$300,000 worth of work for them.

Q. Now had you any experience prior to that time as a contractor?

A. I used to work for the Union Pacific as superintendent of bridge building.

Q. For whom?

603] A. For the Union Pacific and the O. R. & N. Co. All my life has been spent in similar work, superintending contracts.

Q. You are acquainted with the condition prevailing at Portland, Oregon, and thereabouts in the year 1893 and 1894?

A. Yes, sir.

Q. Touching the cost of labor and the value of services and the financial situation? A. Yes, sir.

Q. In a greater or less degree of particularity, I presume?

A. Yes, sir.

Q. What was the financial situation during those two years commencing with July 1893?

A. It was very difficult to obtain money to do anything.

Q. What effect, if any, did that have on salaries and wages and things of that sort?

A. It caused a material reduction.

Q. I wish to ask you this question, Mr. Wakefield; Hoffman and McMullen went into copartnership March 6th, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland under a contract which stood in Hoffman's name. The contract price was \$465,667, and the contractor was required to furnish a bond in the sum of \$140,000, which bond was secured by Hoffman, the sureties being two in number, one a former partner of Hoffman and the other an attorney, who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen each of them was to contribute an equal amount of capital to the prosecution of the enterprise and they were to share equally in its profits and [604] losses. It was also agreed that Hoffman, being a resident of the city of Portland, should have the active superintendence of the work, but that McMullen who resided in San Francisco and controlled offices there and in New York and Seattle, should render all services required of him at these points. After the procurement of the contract with the city the work of manufacturing the pipe, amounting to an item of about \$180,000, was subcontracted, and the work of laying the pipe into position, amounting to a cost of about \$36,000 or thereabouts was also subcontracted, and both these contracts were carried out by the subcontractors. The work of laying the pipe in position and preparing for it by excavation, etc., was actually begun in June, 1893, and between March 10, 1893—the date of Hoffman's contract with the water committee—and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, collecting plant, laborers, etc., and McMullen working on the same thing from San Francisco, Seattle

and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendence of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated until September 20, 1893. During this time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work, was also engaged in other contract operations. Of the plant, consisting of equipment, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20, 1893, Hoffman found two-thirds and McMullen one-third, the value of the latter estimated at from \$1,600 to \$2,300. Owing to his inexperience in such work Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made to him by Hoffman except in the matter of furnishing money until September 20, 1893. During this time an engineer and a superintendent of the field work, together with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20th, 1893, McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned, but Hoffman advanced from his private means at various times in the months of June, July, and August, 1893, the sum of \$14,500, or thereabouts, which was covered by his estimate paid by the water committee on September 21st, 1893, and thereafter Hoffman did not have or need not have any money of his own in the job. Money was very tight and salaries and wages were affected thereby as you have testified. In the partnership contract between Hoffman and McMullen there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts, what do you deem to be a proper salary to Hoffman for services rendered by him over and above the services contributed by McMullen during the period of time between March 6th and September 20th, 1893?

(Counsel for defendant objects to the question as immaterial and incompetent, and that it is based upon facts not proven, and that it is not a correct statement of the conditions that prevailed at the time referred to, and that the witness is not competent to testify on the question.)

A. You mean me to answer from these facts that you have set forth, or from what I know of my own knowledge?

Q. From the facts as set forth.

A. As far as the money was concerned I would say that he ought to have 10 or 12 per cent for the use of the money.

(Counsel for defendant objects to the answer of the witness and moves to strike it out as incompetent, irrelevant, and immaterial.)

Q. Now, then give your opinion as to the value of his services upon all the facts that I have stated to you.

A. My impression is that he ought to have rendered those services as a partner in the concern.

(Counsel for defendant objects to the answer of the witness and moves to strike it out as not responsive to the question.)

Q. If a fair salary was to be paid, what, in your judgement, would be a fair salary?

A. If he was going to have a salary at all you could not very well afford to offer less than \$5,000 or \$6,000. That would be my judgment.

Q. In making that estimate, do you make any allowance for what McMullen was doing as offsetting what Hoffman was doing?

(Counsel for defendant object to the question as immaterial and irrelevant.)

A. No. it would be pretty hard to balance those two accounts. It is always ruable in such work as that for the two [607] partners to devote what time is necessary to the work. I make no deduction for what McMullen was doing.

(Counsel for defendant moves to strike out the answer of the witness as not responsive to the question.)

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. In the answer you gave in which you stated that in consequence of the financial crisis, which began about the 1st of July, money became scarce and hard to get and that the price of labor was materially reduced; do you mean by that to be understood that such service as was performed by Mr. Hoffman as manager of the work that I have been describing to you was materially reduced?

A. No, I do not think it would have affected that kind of work. I refer to just labor.

Q. Common labor?

A. Common labor.

Q. Now, Mr. Wakefield, if you were estimating the value of services of a manager of a business like that on the ground and having full knowledge of the situation of affairs and entire control of it—in fixing the value of his services would you not take into account at all what his partner might have been doing somewhere else, or would you fix it as so much for his services and let his partner have whatever his services were worth?

A. If one of them was paid the other ought to be; if either drew a salary both ought to have been paid for services rendered.

608] Q. Then, in answering the question, if a person doing such work as Mr. Hoffman did was to receive a salary, and you were fixing that salary without any reference to what his partner or anybody else did, what would you say his services were worth?

A. Well, I say the services are hard to estimate from the fact that there ought to be no such charge. I cannot tell what such things would be worth.

Q. I say if you were going to allow any salary at all you could not allow less than \$5,000 or \$6,000?

A. Yes, sir. Hoffman would not consider anything less than that as any compensation.

Q. You are familiar with a new condition of things that would justify you in testifying as to value?

A. Well, of course, in fixing the values of such services a person would have to know all the conditions and what Hoffman did. I know that he had a full corps of assistants and did everything that could be done.

Witness excused.

Office of G. A. Brodie, Examiner, Portland, Oregon.

January 30th, 1896, ten o'clock A. M.

At this time, pursuant to adjournment, appear the parties herein as before, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

JOHN BAYS is called as a witness for the complainant on [609] rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. Where do you reside, Mr. Bays? A. Portland.

Q. What is your occupation?: A. Contractor.

Q. How long have you followed that business?

A. I have been following it in this country since 1867, and many years before that elsewhere.

Q. About what has been your total experience?

A. Well, principally railway work.

Q. What length of time, about?

A. Thirty-five years.

Q. What classes of work have you been engaged upon as a contractor during this time?

A. I have been in the street business since I have been in this country, and general railway contracts.

Q. What character of railway contracts?

A. Well, regular contracts—different things, the whole business.

Q. Construction work? A. Yes, sir.

Q. I wish you would state some of the contracts you have been engaged upon—the character and magnitude of the work.

A. Well, the company built a good part of the O. & C.

[610] Q. By that do you mean the Oregon & California Railway?

A. Yes, sir; they built 1,900 feet of the south end of Wolf Creek Tunnel, and Grave Creek Tunnel. And about a thousand feet at each end of the Siskiyou Tunnel when they stopped in 1894.

Q. What was the magnitude of these contracts—what sum of money did they involve?

A. Why, I cannot say exactly.

Q. Well, approximately?

A. We had one hundred dollars a foot for the Siskiyou Tunnel, and we got not quite a thousand feet at each end; that would be about \$400,000.00 of work done on the Siskiyou Tunnel.

Q. What was the extent of your contract work on the Wolf Creek Tunnel?

A. That would be about nineteen hundred feet, at \$69.00 a foot; I never figured it up.

Q. What was the extent of the work you did on the Oregon & California Railway?

A. Up here in Cow Creek Canyon I done three hundred and seventy odd thousand dollars of work five years ago.

Q. How recently has this work that you have referred to been done?

A. Well, I finished that five years ago in Cow Creek Canyon.

Q. That was the last work?

A. That was the last work of any magnitude.

Q. Are you familiar with what would be a proper compensation for superintending work of the character you have been acquainted with? A. I think so.

Q. Do you know the conditions which were prevailing at Portland, Oregon, in the summer of 1893, commencing with July, in regard to financial matters?

A. Yes, 1893 was pretty good.

Q. July, 1893? A. Yes, sir.

Q. Do you know at what time they had the panic?

A. Well, there was a panic commenced sometime in 1893, I think.

Q. What was the effect of that panic upon wages, salaries, values of that sort?

A. Well, they all came down, of course, after the panic.

Q. I desire to ask you this question, and take your opinion upon it: Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland under a contract which stood in Hoffman's name. The contract price was \$465,667.00, and the contractor was required to furnish a bond in the sum of \$140,000.00 which bond was secured by Hoffman, the sureties being two in number, one a former partner of Hoffman, and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen each of them was to contribute an equal amount of capital to the prosecution of the enterprise, and they were to share equally in its profits and losses. It was also agreed that Hoffman, being a resident of the city of Portland, was to

[612] have the active superintendence of the work, but that McMullen, who resided in San Francisco and controlled offices there, and in New York and Seattle, should render all services which should be required of him at those points. The work of manufacturing the pipe, amounting to about one hundred and eighty thousand dollars, was let on subcontract, as was also the work of hauling the pipe into position, amounting to about thirty-six thousand dollars. The work under the Hoffman contract was actually begun in June, 1893, and between March 10, 1893—the date of Hoffman's contract with the water committee—and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and collecting, plant, laborers, etc., and McMullen working on the same thing in San Francisco, Seattle and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendency of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated until September 20, 1893. During time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work, was also engaged in other contract operations. Of the plant, consisting of implements, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20, 1893, Hoffman found two-thirds and McMullen one-third, the value of the latter being estimated from \$1,600.00 to \$2,300.00. Ow-
[613] ing to his inexperience in such work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made of him by Hoffman except in the matter of furnishing money until September 20th, 1893. During this time an engineer and superintendent of the field work, together with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20th, 1893, McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned; but Hoffman advanced from his private means at various times in the month of June, July and August, 1893, the sum of fourteen thousand five hundred dollars or thereabouts, which was

covered by his estimates paid by the water committee on September 21st, 1893, and thereafter Hoffman did not have or need not have had any money of his own in the job. Money was very tight, and salaries and wages were affected thereby as you have testified. In the partnership contract between Hoffman and McMullen, there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts, what do you deem to be proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen during the period of time between March 6th and September 20th, 1893?

(Counsel for the defendant objects to the question, on the ground that it is not a correct statement of the facts in the case, and that there are assumptions that are false in it, and that the same is incompetent, and immaterial.)

A. Four hundred dollars a month I should say would be a big salary.

Q. You say that would be a large salary?

[614] A. Yes, sir.

Q. What do you know of your own knowledge about salaries to persons occupying similar positions in other like contracts?

(Objected to as immaterial.)

A. Well, I have done some large contracts myself in companies which I have stated, and I never got but two hundred and fifty dollars a month.

Q. Where did you get that?

(Objected to as immaterial.)

A. I got that at Cow Creek Tunnel, and at Siskiyou, and at Cow Creek Canyon—three different places.

Q. What is the character of service that you were called upon to perform in that position?

(Objected to as immaterial.)

A. General superintendent, night and day, sometimes—very often two or three nights together.

Q. General superintendent of the whole work?

A. Yes, sir.

Q. I will ask you to state if you were acquainted with Lee Hoffman during his lifetime?

A. Yes, I was acquainted with Lee Hoffman ever since I have been here—a number of years.

Q. Did you ever have any conversation with him about his relations to McMullen, and to this work?

A. Yes, sir.

Q. When did this occur?

A. About two or three days after it came out in the papers.

Q. After what came out?

[615] A. About McMullen suing him.

Q. After the suit was commenced?

A. Yes, sir.

Q. I will ask you to state what, if anything, Mr. Hoffman said about his relations to McMullen touching this work.

(Objected to as immaterial and irrelevant.)

A. He said McMullen was a partner; that he wrote to him for ten thousand dollars, and he said if he had paid ten thousand dollars, he would carry the balance, and Mr. McMullen wrote back that there was plenty of money in the job, and to borrow the money, that he did not intend to put up any of his own money.

Q. Is that all you recollect on that point?

A. Yes, sir, that is all.

Q. He said that McMullen was his partner?

A. Yes, sir.

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. When he said that McMullen was his partner, he referred to the time he had written him for the ten thousand dollars, did he not?

A. No, he said McMullen was his partner—well, I knew that; at the start when they were figuring.

Q. Did not he refer to his having written McMullen a letter for ten thousand dollars, and that at the time he wrote the letter McMullen was his partner, is not that what he said?

[616] A. He said he wrote to Mac to put up, and if he had put up ten thousand dollars he would carry the balance; that McMullen wrote back to him that there was money enough in the job, and for him to borrow the money.

Q. He referred, then, to the time he wrote the letter?

A. That was the time.

Q. That was what he claimed?

A. Yes.

Q. Now, you say you were superintendent of the work of constructing the tunnels you have mentioned? A. Yes.

Q. You were in the employ of the corporation of Bays & Jeffries?

A. No, sir, I was one of the corporation—a partner.

Q. You were in the employ of the corporation, were not you?

A. Of, course, I was in the employ of myself and the corporation.

Q. The corporation hired you to superintend the work at two hundred and fifty dollars a month? A. Yes.

Q. The business of providing funds to carry that on was furnished by the corporation, Bays & Jeffreys?

A. No, sir, it was paid for, the same as the water committee, monthly.

Q. Did you and Jeffreys, the corporation of Bays & Jeffreys have anything to do with providing funds to carry on the business? A. Certainly.

Q. That was provided by the corporation of Bays & Jeffreys? A. Yes.

Q. And you went in there in the employ of Bays & Jeffreys simply as their superintendent?

A. Yes, but I had to put up the same as the balance of them.

[617] Q. You did? A. Yes, I did.

Q. Now, Mr. Bays suppose there was a contract to manufacture and lay pipe for conducting water from Bull Run to Mt. Tabor in which Hoffman and McMullen was concerned as partners, each agreeing to pay one-half of the expenses—to put up one-half of the money necessary to carry on the business. Mr. McMullen had a lot of plant over at Seattle that he turned in—he has a lot of contractors' tools, and a lot of plant there that he was not using, of the value, say, of from twelve to fifteen hundred dollars. He buys, at the instance of Mr. Hoffman, in New York, a hydraulic punch and shears at the expense of some three hundred dollars, and pays for it. At the request of Mr. Hoffman, he orders in San Francisco a

dozen or more portable forges, which are paid for out of the funds of the company, and not by Mr. McMullen. Mr. McMullen does such things as Mr. Hoffman asks him to do in the way of finding the price of tools and advised with Mr. Hoffman when he is asked by Mr. Hoffman to do so about the propriety for instance of getting a machine to do their ditching with, and does such things as Mr. Hoffman asks him to do, but he does not put up any other money, but Mr. Hoffman has the whole care and management of the job on his hands—not simply the superintending of the business, but has the whole thing on his mind; he is obliged to provide money to carry it on, if the estimates are not promptly paid by the city, and, as a matter of fact, he is obliged to put up, and does put up, about fourteen thousand dollars of his own money. He is obliged to make arrangements, and does make arrangements, after being notified by the city water committee that there is [618] no certainty that he will have any money to pay his men and bills which would come due in September, and he is obliged to make arrangements to meet those bills when they come due, and has the whole care of letting contracts for the manufacture of the pipe, and the whole care and responsibility of letting contracts for the purpose of hauling and delivering the pipe, and takes and carries on the whole business, while Mr. McMullen has to do such things as he is asked to do by Mr. Hoffman, but is not responsible for the work. Mr. Hoffman had to put up a bond for a hundred and forty thousand dollars on which Mr. McMullen is in no way responsible—does not sign it himself, and does not have anything to do with procuring the sureties to sign it. Under those circumstances, Mr. Hoffman carries on his business, and manages it—not simply superintending, but manages and has the whole control of the business. Now, under those circumstances, what do you say would be the value of Mr. Hoffman's services per month.

(Counsel for complainant objects to the question on the ground that it presents an incorrect and incomplete statement of facts.)

A. Four hundred dollars a month.

Redirect-Examination.

Questions by Mr. COX:

Q. What interest did you have as a stockholder in the Bays & Jeffreys Company that was doing these contracts that you spoke of?

[19] A. I had a half interest in the last one, and I had a quarter interest in the other two tunnels.

Q. What interest did you have at the time you were drawing \$250 a month?

A. I had a half interest in one and a quarter interest in the others.

Witness excused.

D. P. THOMPSON is called as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. What is your occupation, Mr. Thompson?

A. I have been a contractor, and banker.

Q. For what length of time have you been a contractor and what class of contracts have you been engaged in?

A. I have been a contractor about forty years, in early days surveying contracts, building jetties on the river, constructing railroads, and constructing tunnels for railroads, erecting waterworks, and contracts for supplying stone for the jetty at the mouth of the Columbia river were the principal contracts.

Q. What was the magnitude of some of these contracts?

[20] A. Well, the railroad contract amounted to a number of million dollars; I cannot give the amount—seven million, perhaps. The contract for the erection of the jetty at the mouth of the Columbia river—the stone there amounted to two or three hundred thousand—two hundred and fifty thousand, perhaps. I cannot give the amount.

Q. What did the tunnel work come to?

A. The tunnel work in which I was interested was on Cow Creek—the Bunker Hill Tunnel and the Siskiyou Tunnel. I cannot give the amount of those contracts, but they amounted

to two or three hundred thousand dollars—five hundred thousand, perhaps.

Q. Was John Bays concerned with you in those contracts?

A. He was.

Q. Are you familiar, Mr. Thompson, during the time that you have been a contractor, with what would be the reasonable value of the services of a general manager or superintendent for such like contracts.

(Objected to as immaterial and irrelevant.)

A. I am familiar with what it would be.

Q. You know what general market value should be applied to such services?

A. Well, I only know what was allowed on the contracts in which I was interested; I know nothing beyond that.

Q. I am speaking of what has been allowed generally; if you were going to employ a general manager for work of that character, would you know what compensation ought to be allowed for salary?

(Objected to by defendant as incompetent.)

[621] A. I think I would; yes, sir.

Q. Were you acquainted with the financial condition of affairs in the summer of 1893, commencing in July in the city of Portland and elsewhere?

A. It was after July.

Q. How soon after?

A. Well, commencing the last part of July. I was not in the country the fore part of that year, and I was not familiar with what was done until the latter part of 1893.

Q. Well, commencing in the month of July, when you returned, I will ask you to state what the condition of finances was generally, and what effect it had on the matter of wages and salaries and compensation for services performed and things of that sort.

(Same objection.)

A. Well, money was very hard to get, and the banks were suspending, very many of them, and it was almost impossible to get money at that time, and the effect, as a matter of course, was a reduction of wages and values of that kind throughout the country.

Q. Did you hear the question I read to John Bays who was within the last hour a witness on the stand, stating the facts

touching the contract between Hoffman & McMullen and the services performed by them in connection with the work embraced within that contract?

A. I did.

Q. Applying that question to yourself I will ask you to state, what in your judgment was a fair and reasonable compensation to allow Hoffman for the services performed by him during the time covered by the question.

(Counsel for defendant object to the question for the same reasons stated when the question was asked of Mr. Bays.)

A. I think that \$5,000.00 a year would be full compensation to Mr. Hoffman if Mr. McMullen done nothing. I might add that Mr. Hoffman would be entitled to interest for any money advanced in addition to that.

(Counsel for defendant moves to strike out the answer of the witness as not responsive to the question.)

Q. Then if McMullen was rendering services, would the compensation allowed to Hoffman be influenced by what McMullen was doing? A. Yes, it would.

Q. I will ask you to state, Mr. Thompson, if you know of your own knowledge anything about salaries which were paid to persons occupying towards other similar contracts the position which Hoffman occupied towards the contract under consideration here?

(Objected to by defendant as incompetent and immaterial.)

A. About that time I only knew of one contract being prosecuted and in that Mr. Hoffman was a partner with myself.

Q. What contract was that?

A. That was in furnishing the stone for the jetty at the mouth of the Columbia.

Q. What did you say was the amount of that contract?

A. I think the total contract was about \$350,000.

Q. Did you have any person occupying towards that the position that Mr. Hoffman occupied toward this contract?

A. Mr. Perry Hinkle had charge entirely of the work, and [623] he received \$150.00 a month, I believe, for his services as superintendent.

(Same objection.)

Q. You may state whether that allowance was made by

agreement of the parties in interest—the contractors.

A. It was.

Cross-Examination.

Questions by Mr. MALLORY:

Q. Now, Mr. Thompson, Mr. Hinkle was a mere superintendent of the works, was he not? A. Yes.

Q. You and Mr. Hoffman and Mr. Hinkle together were the managers of it and had control of the matter, did not you?

A. We had control of the matter, of course, if we chose to occupy it, but we did not do it.

Q. So you simply hired him to superintend the work?

A. Yes.

Q. Now, then, did Mr. Hinkle have anything to do with the responsibility of furnishing and providing means to pay the men?

A. No, Mr. Hinkle only provided his portion.

Q. He paid his portion, and you paid your portion and Hoffman paid his? A. Yes.

Q. There was no question of finances at all?

A. No, the question of finances was not concerned in the matter.

Q. Did you hear the question I put to Mr. Bays?

A. I heard the question; perhaps I did not understand it.

[624] Q. I will ask the question of you: Mr. Hoffman has a contract with the city water committee to manufacture and lay pipes for conveying Bull Run water from Bull Run to Mount Tabor; the contract price of the work is \$465,000 and some odd dollars, and other work is done that increases the amount to something over a half a million dollars. Payments for this work were to be made by the city upon estimates made by their engineer on the 20th of each month as the work progressed. Mr. Hoffman was to have charge of the work under an agreement of copartnership between himself and Mr. McMullen, and each was to furnish one-half the money necessary to carry on the business, and they were to share equally in the profits or stand the losses. A bond for \$140,000 was required to be given by the water committee. This bond was given by Hoffman, McMullen neither signing the bond or furnishing any surety whatever, and so far as the bond was concerned had

no liability whatever under the contract with the city. Mr. McMullen had a quantity of plant such as is used in work on railroad, grading and the like of that—camp equipage, plows, scrapers, and some horses, which he turned over to Mr. Hoffman, the value of which was somewhere from twelve to fifteen hundred dollars. Mr. McMullen lived in San Francisco, his business was there and he was not expected to and did not give the work any direct attention. At the request of Mr. Hoffman, he purchased in New York a hydraulic punch and shears, the cost of which was about \$300.00, which was paid for by the San Francisco Bridge Co. under direction of McMullen.

- 625] Mr. McMullen ordered, at the request of Mr. Hoffman, some dozen or more portable forges for heating bolts to lay the pipe; these were paid for out of the general fund, not by McMullen or the San Francisco Bridge Co. Mr. McMullen furnished no money whatever other than that indicated for carrying on the business. Mr. Hoffman was obliged to furnish all the money, and did in fact from his own funds furnish about \$14,500.00. That about the fore part of September, 1893, when the expenses and payroll for the month would amount to something more than \$20,000.00, he was notified by the water committee that there was no certainty that any money would be obtained or that any bonds would be sold in that month, and that they had no assurance that they could furnish him with money to pay his bills at that time, in consequence of which Mr. Hoffman was obliged to and did make preparations to meet his bills—took the responsibility of doing that and was obliged to do so. He then applied to Mr. McMullen to furnish his proportion of the funds, which Mr. McMullen absolutely refused to do, but on the contrary, recommended to Mr. Hoffman that instead of paying his bills for supplies that he “stand them off” and not pay them. From the time the contract was let in March to the time that the work of laying the pipe began in June, Mr. Hoffman had to make and did make contracts with parties for manufacturing the pipe, having that responsibility entirely on his own hands, and he also let a contract for hauling the pipe out from the place of manufacture to the place of use. He had the entire responsibility of this whole work on his hands. In the meantime such mat-
- 626] ters as ordinarily pertain to a man's affairs he attended to. McMullen did such things as he was asked to do for Mr. Hoffman, and was consulted about the matter of providing tools

for carrying on the work, and the method of conducting the work, by letter and otherwise. Now, having such responsibility and having charge of the work in that form, what would you say his services were reasonably worth?

(Counsel for complainant objects to the question, on the ground that it is based on an incorrect and incomplete statement of facts.)

A. I think that \$400.00 per month or \$5,000.00 per annum, which is substantially the same thing, would be about what his services were worth, and my experience and observation is that where one party furnishes more money than the other they are allowed interest on the money, which has been often done in contracts in which I have been interested.

Q. Now, Mr. Thompson, you do not consider that it was worth anything to Mr. McMullen at all more than simply an ordinary superintendent that he was relieved entirely from all responsibility, that Mr. Hoffman had to carry this whole responsibility on his own shoulders—you do not give Mr. Hoffman any more credit or consider that he was entitled to any more compensation than if he was sure the money was coming and the bills would be coming every day—you put your opinion on that ground—you think he was a mere hired man executing the business that was put into his hands, do not you?

A. No, sir, I do not.

[627]

Redirect Examination.

Questions by Mr. L. B. COX:

Q. What do you think a hired man to perform that service could be had for at that time, Mr. Thompson?

(Defendant's counsel objects to the question, on the ground that the witness does not seem to know, and as incompetent and immaterial.)

A. As good men as I know of, or men that I would as readily have trusted as Mr. Hoffman—and Mr. Hoffman was a trusty man, because I know that from experience—could have been had for \$200.00 a month. But I have estimated the responsibility that attached to Mr. Hoffman as having sole charge of the work without Mr. McMullen having anything to do, as \$400 a month.

Q. You mean that as a charge against the firm or as a charge against McMullen?

A. A charge against the firm—\$400.00 making the charge against the firm.

Q. Now, Mr. Thompson, in the Hinkle matter, was there any different circumstances attending the services that Mr. Hinkle performed to those that Mr. Hoffman performed except in the matter of providing money?

(Question objected to as incompetent and immaterial.)

A. I think that was all except the bond.

(Question also objected to on the ground that it does not appear that the witness knew what Hoffman's duties were and the question is incompetent.)

Q. You may state the scope of Hinkle's duties.

(Objected as immaterial.)

[628] A. He had charge of the whole work; he made what contracts he chose, he bought whatever machinery there was to purchase, and I think the machinery that he purchased amounted to about \$23,000.00, and he had the supervision of the whole work.

Recross-Examination.

Questions by Mr. MALLORY:

Q. You think Hoffman could put his whole time in this work, apply himself to it right along, and McMullen could go about his business and have this work carried on at an expense to him of \$200.00 per month, Mr. Hoffman getting the same amount, that is what you mean?

A. Yes, that is what he should get from the firm—\$400.00.

Q. And he would be entitled to one-half of any profits that resulted to him?

A. I think so.

Q. So, really, Mr. McMullen in allowing \$400.00 per month is only paying \$200.00 to have this whole business carried on?

A. Yes.

Witness excused.

F. T. DODGE is called as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

[629]

Questions by Mr. L. B. COX:

Q. Mr. Dodge, look at the papers I show you and state if you have compared them with the final estimate which was offered in evidence the other day—the estimate from the water committee to Hoffman.

A. Yes, sir, I compared those papers and they are identically the same—that is, they are a true copy.

Q. What is the paper I show you?

A. This paper is a copy of the original contract between Lee Hoffman, doing business as Hoffman & Bates, and the city of Portland.

(It is agreed that the paper last produced by the witness may be received and filed in lieu of "Complainant's Exhibit No. 2," already offered.)

Q. I now show you what purports to be a copy of minutes of the water committee held on the first day of March and the second day of March, 1893, and ask you to state if those are true copies taken from your minute-book.

A. They are.

(Counsel for complainant offers in evidence the paper last produced by the witness. Objected to by defendant as immaterial and irrelevant. The papers referred to are received and filed marked "Complainant's Exhibit No. 26," G. A. B. Ex.)

Q. On the first page of the second paper offered I see a reference made to an entry, "That the following printed matter is a copy thereof"—explain what that means, "the following printed matter."

630] A. It has been customary at the meetings of the water committee for reporters of the newspapers to be present, and as this was a work of interest to the public, important and interesting papers were given to the newspapers to be published, and it was the custom of the water committee to have the printed copy pasted in the records and made a part thereof. In this particular instance, to the best of my recollection, the engineer's letter or statement submitting the bids he kept no copy of, but laid it before the committee with all the bids, and the committee then allowed one of the newspapers to take this statement of bids for the purpose of publication, but the printed matter was an exact copy of his statement.

Q. The meaning of this is that the original minute in your book as to this matter was an exemplified or printed copy of the original letter? A. Yes.

No cross-examination.

Witness excused.

J. B. MONTGOMERY is called as a witness for the complainant on rebuttal and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. What is your occupation, Mr. Montgomery?

[631] A. Well, I am just attending to my own private business. I have no particular occupation ~~just~~ now.

Q. What have you had to do with contract work?

A. I have been a railroad builder and millowner, and have been engaged in the work of taking out rock, and have done all sorts of contract work.

Q. What length of time did you follow such business?

A. Well, from 1858 until 1883 or 1884; there were periods when I was not occupied you know.

Q. I wish you would enumerate some of the contracts upon which you have worked.

(Counsel for defendant objects to the question, for the reason that the witness does not show that he has done any work of that character for ten years prior to the time concerning which he is called upon to testify, and his evidence is incompetent and immaterial.)

A. Well, I had a contract from the Pennsylvania & Hope-well Railroad—the Linden bridge across the Susquehanna, a large bridge probably 1300 feet long. I was interested in the Oil Creek & Alleghany Railroad and about 45 miles of the Kansas Pacific.

Q. What work have you done in this country?

A. Well, I have built pretty much all the railroad between here and Tacoma except 30 miles; I built about 145 miles, I guess, and I have built some 60 or 70 miles of the Willamette Valley Railroad.

(It is agreed between the parties that all this evidence goes in subject to the objection heretofore made by the defendant.)

[632] Q. What experience have you had in the matter of stone work—you said you had some contracts of that character?

(Counsel for defendant object to the question as immaterial and irrelevant.)

A. I have had a good deal of experience in that kind of work.

Q. What have been some of your contracts in that direction?

A. Well, on the Linden Bridge were 7 piers and 2 abutments upon the Susquehanna, in 18 feet of water.

Q. Now, have you been familiar, Mr. Montgomery, with the conditions prevailing in this country down to the year 1893 about the employment of men and the performance of work, and things of that sort? A. Yes, sir.

Q. Do you know what the conditions, generally, were in 1893 and 1894?

A. Yes, they are about as they were in 1883. They were not changed at all—that is, as to labor it was about the same. It was a little less in 1893 probably—yes, in 1893 wages for labor were less.

Q. What was the financial condition, if you know, commencing in July, 1893, and continuing through the remainder of that year and 1894?

A. The financial condition of the country?

Q. Yes.

A. It was in a very bad condition.

Q. Did that prevail here? A. Yes, sir.

Q. What effect did that have, if any, upon the salaries and wages paid to persons engaged in business?

A. Why, it had the effect of reducing them.

[633] Q. I desire to ask you this question and take your opinion upon it; Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland under a contract which stood in Hoffman's name. The contract price was \$465,667.00, and the contractor was required to furnish a bond in the sum of \$140,000.00, which bond was secured by Hoffman, the securities being two in number, one a

former partner of Hoffman's and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen, each of them was to contribute an equal amount of capital to the prosecution of the enterprise, and they were to share equally in its profits and losses. It was also agreed that Hoffman, being a resident of the city of Portland, should be the active superintendent of the work, but that McMullen, who resided in San Francisco, and controlled offices there and in New York and in Seattle should render all services which should be required of him at those points. The work of manufacturing the pipe was sublet at a price of about \$180,000.00, and the work of hauling the pipe into position was also sublet at a price of about \$36,000.00. The work was actually begun in June, 1893, and between March 10, 1893—the date of Hoffman's contract with the water committee—and the commencement of the work both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and collecting plant, laborers, etc., and McMullen working on the same thing from San Francisco, Seattle, and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendency of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated until September 20, 1893. During this time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work, was also engaged in other contract operations. Of the plant, consisting of implements, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20th, 1893, Hoffman found 2-3 and McMullen 1-3, the value of the latter being estimated from \$1,600.00 to \$2,300.00. Owing to his inexperience in such work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made of him by Hoffman except in the matter of furnishing money until September 20th, 1893. During this time an engineer and a superintendent of the field work, together with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20th, 1893,

[635] McMullen advanced no money to the firm except that represented by his contribution to the plant above-mentioned but Hoffman advanced from his private means at various times in the months of June, July, and August, 1893, the sum of \$14,500.00 or thereabouts, which was covered by his estimate paid by the water committee on September 21, 1893, and thereafter Hoffman did not have, or need not have had, any money of his own in the job. Money was very tight, and salaries and wages were affected thereby, as you have testified. In the partnership contract between Hoffman and McMullen, there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts, what do you deem to be a proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen during the period of time between March 6, and September 20, 1893?

(Counsel for defendant object to the question, for the reason that it is not a correct assumption of the facts shown by the evidence, and that the question is incompetent, irrelevant, and immaterial.)

A. I would consider that an ample salary from the 1st of March to the 1st of September, 6 months, would be \$250.00 a month, and I can give you my reasons if you desire.

Q. Go on and state your reasons if you desire.

A. My reason is that I had Mr. Hoffman employed when I had charge of 60 or 70 miles of road in the Willamette Valley; I had him employed in building 4 or 5 bridges, and probably \$20,000 or \$30,000 worth of trestle work, and during that time I paid him \$135 a month.

Q. You were acquainted with Mr. Hoffman, were you?

A. O, yes, and I also had him build my warehouses and I paid him, I think, \$4.00 a day—probably \$5.00—but wages were higher then than they are now.

(Counsel for defendant moves to strike out that portion of the answer of the witness in regard to his own personal affairs with Mr. Hoffman.)

[636] Q. I will ask you to state whether you have known of your own knowledge any person occupying towards a job similar to the contract under consideration the position which Hoffman occupied towards it—that is to say, having an interest in the

contract and at the same time acting as general manager or superintendent, and, if so, what salary was allowed in the instances that have fallen under your observation.

(Question objected to by counsel as incompetent and immaterial.)

A. Where a party has an interest in it?

Q. Yes, where he has an interest and is also acting as general manager or superintendent.

A. Well, I do not know of such a case. I know a case where they had a third interest, but they were not allowed any salary at all.

Q. Do you call to mind any instance in which a salary was allowed to a party having an interest?

(Question objected to by counsel for defendant as incompetent and immaterial.)

A. No. I do not. I can only speak of my personal experience. In Pennsylvania I had a number of contracts, where I had partners in the work and I did not allow them any salary at all. I would come down and consult with them, but I did not allow them any salary. They took the risk along with the others.

Q. I will ask you another question—now, what was the magnitude of some of the contracts upon which you were engaged?

A. O, some of them amounted to millions of dollars, and some of them were from \$35,000 to \$80,000.

Cross-Examination.

27]

Questions by Mr. R. MALLORY:

Q. You have not done anything in contracting, or hiring or discharging men since 1883?

A. Not since 1884.

Q. You have not done any business in that line since then?

A. No, I have not had any railroad business; I have had mills.

Q. You have not had much to do in the matter of fixing wages or dealing in wages? A. Not since that time.

Q. Now, Mr. Montgomery, you say that the pressure of times in financial matters about the close of 1893 would materially reduce wages; do you mean to say that they would

materially affect the wages of men who were engaged in executing contracts where they were superintending and managing the whole business, and carrying it on and having the whole responsibility of it—would the fact that wages were reduced affect the value of their services?

A. Well, I should suppose that all wages ought to come down.

Q. I am asking you for the facts.

A. I have not had any experience recently, although I know that wages have been very much reduced under such conditions as I have stated, where men who were managing and controlling and handling great enterprises, that the [638] prices paid for the services of men of that kind were reduced—

Q. Do you know that to be so?

A. Certainly; if I had had men employed I certainly would have reduced their wages.

Q. I am not asking you that question.

A. I do not know anything about it. I have not been in the business.

Q. Now, then, Mr. Montgomery, Mr. Hoffman was awarded a contract by the city water committee for manufacturing and laying of steel pipe required to convey water from Bull Run to Mt. Tabor. The amount of the contract was \$465,667, and Hoffman and McMullen operated together to get the contract, and afterwards reduced their contract to writing and made themselves partners, and agreed that each should furnish one-half the money necessary to carry on the work, and should share equally in the profits and losses. Hoffman to take charge of the contract in Oregon and of the general supervision and management of it. A bond was required of Mr. Hoffman by the water committee for \$140,000, to secure the performance of the contract. Immediately after the contract was awarded Mr. Hoffman made a contract with Wolff & Zwicker to manufacture the steel into pipes from the plates, the amount of which was \$180,000, or about that, and he also made a contract with another party to haul the pipe when manufactured to the place where it was to be used. Mr. McMullen, or the San Francisco Bridge Company, of which Mr. McMullen was the principal stockholder, had a quantity of plant such as is in use by railroad contractors, consisting of

- 39] camping outfit, scrapers, plows, carts and a few horses valued anywhere from \$1,200 to \$1,500. That was turned over to Mr. Hoffman to help carry on the work and Mr. McMullen, at the instance and request of Mr. Hoffman, purchased in New York a hydraulic punch and shears at an expense of about \$300. Mr. McMullen, also, at the request of Mr. Hoffman purchased a dozen or more portable forges for heating rivets out on the line, and he did such other chores as Mr. Hoffman asked him to do from time to time, and consulted some with Mr. Hoffman about the kind of tools they had better provide and did such things as that, but his own time was left entirely at liberty and he was under no obligation to give any attention to this matter at all. Mr. Hoffman commenced the work of laying this pipe about the first of June, and from the first of June until the 30th of September he had put in about \$14,500 of his own money. Payments were to be made for the work provided for in this contract upon estimates made by the engineer of the water committee on the 20th day of each month. In the early part of September, on account of the condition of finances, the water committee were not aware certainly that they could make sale of any bonds for that month to meet the bills due in that month. Under the arrangement they had for selling the bonds the party had an option to buy, but he had to notify the committee on the 5th day of each month how many bonds they would take that month, but on the 4th day of September the committee was informed by the party that had this option for the sale of bonds that they could not take the bonds necessary to meet their bills on that month unless the option to take
- 40] them could be extended to the first of October. This left the committee without any certainty of having the money to met the bills that were due on the 20th of the month. A meeting of the committee was called and Mr. Hoffman was called before them, and was notified that there was no certainty that there would be any money to pay the bills, amounting to some twenty odd thousand dollars, on the 20th. In the meantime Mr. McMullen had put nothing into the contract at all except the plant and the money that he paid for the punch and shears. Mr. Hoffman called upon him to put up his share of the money. Mr. McMullen declined to put it up, and responded to Mr.

Hoffman's call by telling him that he ought to stand off the men; that he had not agreed to pay until he could pay them—to stand them off until they got money, and sent no money to Mr. Hoffman whatever—declined to furnish him with any, and in order to have the work go on Mr. Hoffman was compelled to make arrangements with other parties to furnish the money, and did make such arrangements. He carried the whole responsibility of that contract on his shoulders; he executed the bond. Mr. McMullen was not on the bond at all and was not liable in any way. Mr. Hoffman took the whole business and managed it himself—took all the responsibility and attended to the affairs of the company as they were required, and everything that was done about it developed upon him in so far as the work of managing the business was concerned. Now, I will ask you to state what, under such circumstances, you think would be a fair compensation for his services.

A. How long did he have to have that money in—how many months?

[641] Q. The money that he advanced was in from the early part of June until the 20th of September, but at the time that he advanced this money he had no certainty when he would get it back.

A. He got it back in September?

Q. Yes.

(Counsel for complainant object to the question as presenting an incorrect and incomplete statement of facts as shown by the evidence.)

A. Well, I can answer that best by telling my own experience.

Q. Just answer my question.

A. Well, I do not think it would alter my opinion of \$250 a month; I can give you my own experience.

Q. I do not ask you for your own experience.

A. Well, I can only judge from my own experience.

Q. I understood you to say that Mr. McMullen could go in with Mr. Hoffman on a contract like that, and relieve himself of the entire responsibility of the contract, and have nothing whatever to do with it, and could hire Mr. Hoffman for \$125 a month.

A. Did not I say \$250 a month?

Q. One-half of the amount—one-half of \$250 was Mr. Hoffman's, and Mr. McMullen's part of that would be \$125.

(Counsel for defendant object to the question as based upon a misstatement of facts.)

A. Judging from what my own experience was I would say that for a man to put up all the money and to furnish all the bonds and security, that \$250 was ample compensation.

2] Q. Mr. Montgomery, you had not heard of this case until you were on the stand? A. I have heard of it.

Q. You have not talked on this subject? A. No.

Q. Neither with Mr. McMullen or Mr. Cox?

A. No, but I have been cognizant of the case.

Q. But have not talked with Mr. McMullen? A. No.

Q. He did not know what your testimony would be?

A. No.

Q. You never told him what you thought would be the value of a man's services?

A. I have talked with him very little. He told me the suit was going on.

Q. That is all the conversation you had?

A. Yes, sir.

Redirect Examination.

Questions by Mr. L. B. COX:

Q. Mr. McMullen stated to you a day or two ago that he wanted you to give testimony? A. Yes, sir.

Q. You did not tell him what your testimony would be?

A. No, I did not tell him that because I did not know.

Q. Now, Mr. Montgomery, this figure that you express—\$250 per month—was that intended to be a charge against the job, or against the firm?

643] A. I should think it ought to go against Mr. McMullen. I did not think about that, but I think it ought to go against McMullen.

Q. Then your judgment would be \$500 against the firm?

A. Yes, \$500 against the firm, \$250 against McMullen; he ought to pay that out of his share of the profits whatever it was.

Q. Then Hoffman should draw his money out of the firm assets before there was any division between him and McMullen? A. Yes.

Q. Now, what would he draw out of the firm assets?

A. He ought to draw \$500—that is, \$250 for himself and \$250 for McMullen.

Witness excused.

I. W. SMITH is recalled as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. Have you any means of determining during what time in the winter of 1893 and 1894 the work which was being done by Hoffman in the laying of the steel pipe on the Bull Run line was shut down to such an extent that it was practically suspended?

[644] A. Well, the only way I know is by the amount of work done and the different estimates. The work started in in 1893 and continued during the whole winter.

Q. What was the work done in January, February and March, according to your estimates?

A. My estimate for December, 1893, was \$14,040.79; for January, 1894, \$1,865 and for February, 1894, \$3,803. I have no estimate for March, because the work was not completed—no portion of the work was completed.

Q. How was it in April?

A. March and April two estimates, \$48,078.89. There was work done in March but none of it was completed, and I refused to give an estimate, but the estimate for April is for two months.

Q. What was your estimate for November, 1893?

A. To September 30th, \$31,539.81, and for November \$6,343.39. I will say with regard to these estimates that 10 per cent was deducted from the actual amount, so that these amounts are actual amounts less 10 per cent.

Q. Can you tell, Colonel, what money was paid to Hoffman in September, 1893? A. \$31,539.81.

Q. How much was the estimate for October?

A. The October estimate was \$66,803.85.

No cross-examination.

Witness excused.

S. W. ALDRICH is called as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

645]

Direct Examination.

Questions by Mr. L. B. COX:

Q. Where do you live? A. Portland, Oregon.

Q. What is your occupation? A. Contractor.

Q. How long have you followed that pursuit?

A. About ten years.

Q. What character of a contract have you been concerned in?

A. In construction work of most all kinds, from water-works to building tunnels on railroads.

Q. I wish you would enumerate some of the contracts that you have been connected with?

A. Well, there was the Portland Water Works, building of the reservoir up here in the City Park, and the extension from here to the sound line of railroad when that was stopped.

Q. You mean the railroad extension?

A. Yes, sir, and also a railroad building in Idaho and California.

Q. What amount of money was involved in these contracts as you have enumerated, Mr. Aldrich, or some of them?

A. Well, I think my contract up here—building the reservoir—the original contract was not so much, but before I got through it came to some seventy or eighty thousand dollars.

Q. What did the railroad contracts which you had amount to?

A. That would be a hard matter for me to tell.

646]

Q. Approximately.

A. Well, on the sound line I had just got started when they shut down; I done about seventy thousand dollars' worth of

work; the original contract came to about four hundred thousand dollars.

Q. Were you in Portland in the summer of 1893?

A. I was.

Q. What was the financial situation here and throughout the country during that summer commencing along in July?

A. Well, I always found it tough enough, and I don't consider it is any too good now.

Q. Was there any marked difference between the condition of finances here generally and throughout the country commencing with July, 1893, from what it was before that time?

A. I do not know as I would be prepared to answer that intelligently; it is something that I never paid much attention to; it used to keep me rustling to meet my bills, but I always done it, and that was about all the attention I paid to the matter.

Q. What was the situation in regard to the banking business and things of that sort?

A. Well, they were in terrible bad shape; I know that myself; it closed up some of them here.

Q. Now, what effect had this condition of things upon wages, salaries and the compensation paid for services, if you know?

[647] (Counsel for defendant objects to the question, on the ground that the witness has not shown himself competent to answer.)

A. Well, I have paid less for them during the last two years than I ever did previous.

(Counsel for defendant moves to strike out the answer of the witness as not responsive to the question.)

Q. Do you know, from your own observation, what the general effect was in regard to salaries and wages and general compensation paid people during the time that I called your attention to, 1893 and following, 1894.

(Counsel for defendant objects to the question, on the ground that the witness has not shown himself competent to answer, and because the question is immaterial.)

A. Well, I think the general depression of business and finances of the country caused everything to go down and wages were less then than they have ever been since I have

been in the country. I have myself hired men for less money than I ever did before.

(Counsel for defendant moves to strike out the answer of the witness as not responsive to the question and as immaterial.)

Q. I will submit this question to you and ask your opinion upon it: Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland under a contract which stood in Hoffman's name. The contract price was \$465,667.00, and the contractor was required to furnish a bond in the sum of \$140,000.00. which bond was secured by Hoffman, the sureties being two in number, one a former partner of Hoffman's and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen, each of them was to contribute an equal amount of capital to the prosecution of the enterprise. and they were to share equally in its profits and losses; it was also agreed that Hoffman, being a resident of the city of Portland, should have the active superintendence of the work, but that McMullen, who resided in San Francisco and controlled offices there and in New York and in Seattle, should render all services which should be required of him at those points. The work of manufacturing the pipe was sublet at a price of about \$180,000.00, the work of hauling the pipe into position was also sublet at a price of about \$36,000.00. The work was actually begun in June, 1893, and between March 10th, 1893—the date of Hoffman's contract with the water committee—and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and selecting plant, laborers, etc., and McMullen working on the same thing from San Francisco, Seattle and New York. Upon the commencement of active operations in June Hoffman assumed the superintendence of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated, until September 20th 1893. During this time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention

[649] to this work, was also engaged in other contract operations. Of the plant consisting of implements, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20th, 1893, Hoffman found two-thirds and McMullen one-third, the value of the latter being estimated from sixteen hundred to twenty-three hundred dollars. Owing to his inexperience in said work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made of him by Hoffman, except in the matter of furnishing money until September 20th, 1893. During this time an engineer and a superintendent of the field work, together with a purchasing and disbursing agent and a bookkeeper, were employed at expense of firm. Between June and Sept. 20th, 1893, McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned, but Hoffman advanced from his private means at various times, in the months of June, July, and August, 1893, the sum of fourteen thousand five hundred dollars or thereabouts, which was covered by his estimates paid by the water committee on September 21st, 1893, and thereafter Hoffman did not have, or need not have had, any money of his own in the job. Money was tight and salaries and wages were affected thereby as you have testified. In the partnership contract between Hoffman and McMullen there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts, what do you deem to be a proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen during the period of the time between March 6th and September 20th, 1893?

[650] (Counsel for defendant objects to the question, on the same ground as stated when the same question was propounded to other witnesses.)

A. Is that for a month or for the whole time?

Q. For this period of time between March 6th and September 20th, 1893?

A. I consider \$2,500 a big salary.

Q. \$2,500 for seven months? A. Yes, sir.

Q. What would you say per month?

A. About \$325.00, or a little more—\$350.

Q. What would you say, Mr. Aldrich, as to the compensation to be allowed during the months of March, April and May, when the parties were getting ready for the work, in comparison to the compensation to be allowed during June, July, August and part of September, when the work was actually being carried on?

A. Well, that would depend a good deal on the amount of time that would be required; a man is paid for time whether he is getting ready or actually prosecuting the work.

Q. In fixing this charge do you mean an allowance against the firm of Hoffman and McMullen or a charge against McMullen only? A. Against the firm.

Q. I will ask you to state, Mr. Aldrich, if you know of any man situated towards any similar job as Hoffman was situated towards this job, who drew a salary, and if so, what was the amount paid him.

(Counsel for defendant objects to the question as incompetent and immaterial, and that the witness is not qualified to answer.)

A. Well, I have, but it was not strictly laying pipe; it was handling men.

Q. What I mean is, in a work of this magnitude, requiring a general superintendent, such as Mr. Hoffman was required to perform as general manager of this work.

A. Well, I have charge myself of ten times as many men as he had and I do not say that in any disparagement of him.

Q. Where was that?

A. That was on the line from here to the Cascades under Thielsen and J. L. Hallett. Hallett had charge of all the men on that line and he was paid a salary of \$500.00 a month and I was foreman under Hallett.

(Counsel for defendant moves to strike out the answer of the witness as incompetent and not responsive to the question.)

Q. Do you know of any man who was both a contractor and also a superintendent, as Hoffman was in this case, who had an interest in the outcome of the contract in addition to the allowance which might be made him for his time as superintendent—a man occupying the position of Hoffman towards this contract or towards any contract?

A. Well, I had a contract myself five miles on the Kalama branch with my partner. We had about \$350,000 or \$400,000 contract. I drew a salary of \$150.00 a month for staying on the job and looking after the work.

[652] Q. What were your services in that connection—what were the scope of your duties?

A. General superintendent of everything—had charge of everything.

Q. What was the amount of your contract?

A. I stated that before; we did about \$70,000.00 worth of work and they shut down.

Q. What was the total amount of the contract?

(Same objection.)

A. Somewhere near \$400,000—the whole thing.

Q. Now, was it on the basis of the character of your work that you were allowed the salary that you drew?

A. Yes, that was the understanding when we started in.

(Counsel for defendant moves to strike out the answer of the witness as incompetent.)

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. When Mr. Hallett was general manager and superintendent of building the O. R. & N. Co. line, what he had to do was general manager of the men and to see that the work was carried on?

A. He was superintendent of the whole thing.

Q. He had nothing whatever to do with furnishing money or providing means for carrying on the work?

A. No.

[653] Q. Would you consider that it would affect the value of a man's services if he were a partner in a contract where it had been agreed between him and his partner that they should put up equally the amount of money necessary to carry on the work, and the partner in charge had to provide the means himself, his partner refusing to put up any money at all, and he had to provide it all from his own funds, and manage the work and conduct it all—would you consider that a man under such circumstances would be entitled to any more salary as

against his partner than he would if he was simply on the ground to direct the men as Mr. Hallett was or as you were?

A. Well, I have been placed in that very same position myself.

Q. Just answer my question.

A. No, I do not.

Q. Do not make any difference? A. No.

Q. I will ask you this question: Suppose that Mr. Hoffman had taken charge of a contract with the city to manufacture and lay pipe for conducting Bull Run water from Bull Run to Mount Tabor, the amount of the contract being \$465,000.00 and some odd dollars; an agreement was entered into between himself and Mr. McMullen, in which they propose to do the work together, each putting up his share of the money necessary to carry on the work, Mr. Hoffman to attend to and manage the affair, but Mr. McMullen don't put up any part of the money at all when called on, but did contribute part of the plant and bought a pair of hydraulic shears and a hydraulic punch, and did such chores as Mr. Hoffman asked him to do in San Francisco and New York, and performed services in the way of advising Mr. Hoffman, when asked for advice, as he was able to, but Mr. Hoffman put in all the time necessary to the conduct of the work. Between the first of March and 654] the first of June Mr. Hoffman had to provide for manufacturing the pipe and in order to do that he had to make contracts and did make contracts with a firm where the amount required was some \$180,000, and he also had to and did make contracts for the delivery of the pipe on the ground to the amount of some \$36,000, he had in a general way all the responsibility of the contract, and his partner had no liability whatever on the bond required for the performance of the contract—a bond for about \$140,000 that Mr. Hoffman was required to give to the city. During the progress of the work, when Mr. Hoffman was without funds of his own to meet the demands of the business, he was notified by the water committee that they had not sold their bonds, and had no assurance that they would make sales in time to enable him to pay his bills due in the month of September, amounting to over \$20,000.00, and he was obliged to, and as a matter of fact did, make all necessary arrangements to provide funds in case they were not furnish-

ed by the water committee. Mr. McMullen refused to put in any money and when asked to put up simply notified Mr. Hoffman to stand off his creditors and not to pay the men who furnished him supplies until he got ready, or something to that effect. Now, I would like to ask you to state whether or not in your opinion the services of Mr. Hoffman in that case would be worth any more than in case he was a mere naked superintendent.

(Counsel for complainant object to the question on the ground that it presents an incorrect and incomplete statement of facts.)

[655] A. Well, there are so many circumstances connected with a thing like that.

Q. You can state your general conclusion about it, whether it would or not.

A. Well, I think he would be a little more valuable to the firm than if he was an outside man hired on a salary, inasmuch as his own interests were involved.

Q. Would his services be worth any more to the firm than a man as I have named?

A. I said \$2,500.00; I just guessed it at \$325 to \$350 a month; I did not stop to figure it up. When that question was asked I was asked as to a superintendent, but when it comes to including brokerage and such things as that it would make a difference. It is a separate question.

Q. Answer the question I put to you without reference to other questions.

A. It is a hard thing for me to do, because it is just the same thing as putting a premium on money and such things as that. It is a nice question for a man to answer.

Q. Just state whether in your opinion his services are worth any more in the one case than in the other.

A. I think they would in that case.

Q. How much—can you estimate?

A. That would depend upon the amount of money. Of course he would work for his own interest, for he is bound to do that—every man is bound to look out for his own interest.

Q. How much more was his services worth, if any?

[656] A. Well, I should not consider it worth over \$5,000 a year at that.

Q. That is upon the assumption that Mr. McMullen has his own time to do what he pleases; he is under no obligation to do anything, but if he sees fit to respond to what Mr. Hoffman asks him to do, he does it, but otherwise he is under no obligation to do anything—his time is not taken up.

A. I am not saying anything about McMullen.

Q. Assuming the contract between Hoffman and McMullen to be that Hoffman was to take charge of the business and give it his attention, and Mr. McMullen was at liberty to attend to his own affairs unaffected by this contract so far as their agreement was concerned—now, I will ask you to state whether in that case Mr. Hoffman would be entitled to any more money than you have named.

(Counsel for complainant objects to the question, on the ground that it is based upon a false and incomplete statement of facts as shown by the evidence.)

A. I think I have named what Hoffman ought to have for putting in his time whether Mr. McMullen put in any or not. As I understand this thing it was the agreement that he should put in his time.

Redirect Examination.

Questions by Mr. L. B. COX:

Q. Mr. Aldrich, would the fact that Mr. Hoffman put \$14,500.00 into this job for two or three months more than McMullen put in alter your opinion as to the amount of salary that Mr. Hoffman ought to be paid as superintendent?

A. Well, I do not know as the sum was stated in the question to me. Of course, if he put up that money then of course it is like this, it is a hard thing for me to answer or for anybody else to decide, that should have been the understanding that if he put up money he should be paid for it.

Q. Now, is not the contribution of money by one partner a totally different thing from the allowance to him for his personal services?

(Objected to as incompetent and immaterial.)

A. When I spoke of \$5,000.00 a year it was to provide him for any extra trouble or anything like that.

Q. My question is, is not the contribution of money a different thing from the contribution of personal services?

(Same objection.)

A. As a general thing, nobody without he is interested will hire out with that understanding. They hire out for their services.

Q. Now, then, if Mr. Hoffman put this amount of money into this job more than Mr. McMullen according to the statement made you, would Mr. Hoffman's compensation on that amount of money rest upon Hoffman's personal services, or would it rest upon his being paid interest on the money that he had in the job more than McMullen?

A. That should be in one sense of the word the agreement between them how they should make it.

[658]

Recross-Examination.

Questions by Mr. R. MALLORY:

Q. Suppose that Mr. Hoffman and McMullen were engaged in the execution of the contract which required the outlay of a large sum of money, and when they entered into the contract they agreed together that each should furnish his share of the money, and Mr. McMullen entirely fails to furnish any money at all except in the form of some machinery or supplies that was put on the job, and the whole responsibility of procuring money was put upon Hoffman, and he procures it and carries on the job, when otherwise it might have failed—now, do you not think that Mr. Hoffman is entitled to more pay from McMullen than he would have been if he had been a mere superintendent?

(Objected to by complainant on the ground that it assumes facts not in evidence.)

A. Well, there is another question as I say, because I have seen that thing done before; of course they ought to have compensation for it, but it is hard to put it in a salary.

Witness excused.

PHILIP BUEHNER is recalled as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

[659]

Questions by Mr. L. B. COX:

Q. Have you your contract with Hoffman?

A. Yes.

Q. Will you produce it please?

(Witness produces contract.)

Q. (Con.) This was executed by yourself—is that your signature? A. Yes, sir.

Q. Did you see Mr. Hoffman sign it?

A. No, I did not see him sign it.

Q. Do you know that to be his handwriting?

A. I recognize that as his handwriting.

Q. He acted upon it?

A. Yes, he brought it to me signed.

(Counsel for complainant offer in evidence the first four pages of this contract between Hoffman and Bates and the Wolff & Zwicker Iron Works. Objected to as incompetent and immaterial and not rebutting evidence. It is stipulated that a copy of the pages offered in evidence may be made and substituted in lieu of the original to be filed and marked "Complainant's Exhibit No. 27," G. A. B., Ex.)

Witness excused.

JOHN KIERNAN is called as a witness for the complainant, and being first duly sworn, testified as follows:

[660]

Direct Examination.

Questions by Mr. L. B. COX:

Q. Are you a member of the firm of Cook & Kiernan?

A. Yes, sir.

Q. Is it a corporation?

A. Yes, sir. I am president and manager of the company.

Q. Were you such in the year 1893? A. Yes, sir.

Q. Did you ever have any contract with Lee Hoffman under the firm name of Hoffman & Bates in connection with the manufacture and laying of pipes from Bull Run Creek to Mt. Tabor?

A. I had a contract for hauling pipe.

Q. Have you that contract with you? A. Yes, sir.

(Witness produces contract.)

Q. This was signed by you? A. Yes, sir.

Q. Is that Hoffman's signature appended to it?

A. I am not familiar with his writing. I think it was, though.

Q. He acted on the first three pages of that contract, did he?

A. Yes, sir.

(Counsel for complainant offers in evidence the first three pages of the contract produced by the witness. Objected to as incompetent, irrelevant, and immaterial, and not rebuttal evidence. It is stipulated that a copy of the pages offered in evidence may be made and substituted in lieu of the original, to be [661] filed and marked "Complainant's Exhibit No. 28, G, A. B.," Ex.)

No cross-examination.

Witness excused.

JOHN McMULLEN is recalled as a witness on his own behalf on rebuttal.

Direct Examination.

Questions by Mr. L. B. COX:

Q Mr. McMullen, I will ask you to state what, if anything, you may know about the matter of making a subcontract with the Wolff & Zwicker Iron Works in regard to the manufacture of the pipe that was laid from Bull Run Creek to Mt. Tabor.

(Counsel for defendant objects to the question as immaterial and not rebuttal evidence.)

A. I was in Portland at the time the contract was made; that is, the time it was made verbally. They made a verbal agreement with Hoffman and myself that we accepted, but we could not execute a contract with them until after we got the contract executed with the city. It was executed with the city on the 19th of March, and the contract with Wolff & Zwicker and Hoffman & Bates for the manufacturing was executed on the 11th of March.

Q. You may state whether or not you assisted Mr. Hoffman [662] in arranging that contract and coming to an agreement as to its terms.

(Counsel for defendant objects to the question as immaterial and not rebuttal evidence.)

A. Well, we both canvassed the propriety of doing it, and concluded that we had better do it, inasmuch as it would relieve us of a very large responsibility about furnishing a very large amount of money to build and equip a shop with.

(Counsel for defendant moves to strike out the answer of the witness on the ground that it is not competent testimony.)

Q. What do you know about the Cook & Kiernan contract?

(Counsel for defendant objects to the question as immaterial and not rebutting evidence.)

A. I know that Mr. Hoffman reported to me before he made that contract that he had an offer for doing the hauling and distributing the pipe along the line for the price that we had estimated for this part of the work or a little lower. I think it was a little lower than our estimate. He asked me what I thought about it, and I told him that if they were responsible people he had better close it with them, and he did close it with them then, and he sent me a copy of the contract that he had made with them, as he did also a copy of the contract that he had made with Wolff & Zwicker after it was executed. He sent to San Francisco a copy of them.

Q. What do you know about the plant that Hoffman contributed to this enterprise between June, when it started up, and the 20th of September, 1893?

663] (Counsel for defendant objects to this question on the ground that it is immaterial and not rebutting testimony.)

A. It was some that he had on hand.

Q. You had a certain amount on hand and he had a certain amount on hand?

A. Yes, but I won't say that all that went into the work between June and September was second-hand material, but I think the bulk of it was. I think three-fourths of it was. There was some special tools that were required for this job and some special tools furnished, like forges, hydraulic shears, and some tools for raising the pipe and lowering it into the ditch, which we called "differential blocks."

Q. Did you and Hoffman have any talk about this matter of providing plant?

(Counsel for defendant object to the question as immaterial and not rebutting evidence.)

A. Yes, we agreed that each should put in what each had on hand that was suitable.

Q. Mr. Willis gave some testimony in regard to your having made an assignment some time prior to the execution of this contract between Hoffman and yourself; I will ask you to state whether or not any such thing existed at that time.

A. About seven years before this time the San Francisco Bridge Company made an assignment and which developed into an extension of time, and they would pay in full, but at that time the creditors gave them an extension of time. That [664] was in 1886. At that time that this work was projected the San Francisco Bridge Company was solvent and abundantly able to meet any of its obligations.

Q. Was there any of this old indebtedness or anything of that sort hanging over you at that time?

A. No, sir.

Q. I will ask you to explain the circumstances connected with your failure to supply money to this firm during the summer of 1893 in response to Mr. Hoffman's demand.

(Counsel for defendant object to the question as incompetent and immaterial and not rebutting testimony.)

A. Well, the failure to supply money at the particular time that Mr. Hoffman asked for it, which was in the fore part of September—I think there was a letter in August, but the urgent letters were on the 11th and 16th of September—was on this account: it was then that the financial panic was at its highest and we had quite a large amount of money out. In one place alone we had, I remember, \$30,000 that we were unable to collect, and I so advised Mr. Hoffman and told him that earlier in the season or later I would be able to remit him the money if it was still necessary. I would like to say right here, though, that when we got this contract I proposed to Mr. Hoffman, first verbally and subsequently in writing, that we go to a bank here in Portland and make arrangements for such money as we thought we would need to carry on the job. It was deemed or conceded by both of us that the amount of money required after the subcontract for manufacturing the pipe [665] had been made would be small, and there would have been no difficulty in raising abundant and ample money to carry this job on if Mr. Hoffman had consented that we should take this contract to a bank and show them that in it was an estimated profit of \$100,000, and that the city was good pay, that they pay 90 per cent of the estimates and that after we got started, in two or three months, we would get sufficient estimates to reimburse any loan that we might need, or that we might take out on account of it. The contract itself was a valuable asset

—as much so as this brick building is or any other valuable property. Mr. Hoffman met me with the proposition that “it will be time enough to do that when we need the money.” “Well,” I said to him then, “I do not think that is good policy. I think that as we have entered into this contract we should have funds, which is an essential and important part of it, and that we should adopt that policy now and here.” “Well,” he said, “it is time enough to do that when we need the money.” Well, of course; the upshot of it was that when we needed the money was in the most critical time of the financial panic, and we could not borrow money on government bonds. Then he wrote me these urgent letters that I should furnish and peremptorily put up and advance a sum of money on his say so. His letter of September 11th, in my judgment, misrepresented the facts of the case, and subsequent developments bears it out—the records of the books in the office to-day bear out that this letter misrepresented grossly the needs of the firm. The letter of September the 16th was, in my mind, written premeditatedly for the purpose of laying the foundation to exclude me from this contract. It was not written in good faith. My answer to it shows that the Risdon Iron & Locomotive Works, who had an estimate coming from the same source, and whose place of business was 700 miles from here, were advised that their money would be paid without any question, and that the bonds had been sold and sent away, and that the money would be here to pay as usual, and I so stated in my reply to his letter of the 16th. I did not want to pointedly accuse him of bad faith, but said that as one of the things to show that there was not going to be a default.

(Counsel for the defendant moves to strike out all that part of the answer of the witness commencing with the words, “I would like to say right here,” for the reason that it is irrelevant, immaterial, and impertinent and an argument on the merits of the case.)

Q. Did Mr. Hoffman ever make any response to your statement that you have just mentioned in your letter telling him that he must have known when he wrote that the committee had its money or would have it?

A. He never did.

Q. I will ask you to state, Mr. McMullen, if you ever will.

fully or designedly refused to furnish money to the firm or to this work when it was in your power to do so.

A. I never did.

Q. I show you defendant's "Exhibits U2 and V2," and I will ask you if you have seen papers of that character—just these two sheets.

[667] A. I think I have seen the original of these papers, although I have not seen them for two or three years. I am not sure that these are copies, but I think I have seen the original of these papers.

Q. At all events, you have seen something similar to them?

A. Yes, sir.

Q. Where did you see them?

A. Well, I think I saw them at our office in San Francisco, and very probably I saw them in Mr. Hoffman's office in Portland. I probably brought them there when I came here.

Q. Now, I will ask you to state what that paper was designed for.

(Counsel for defendant objected to the question as immaterial.)

A. This paper was made—the original of it was made primarily to arrive at an approximate size of each contract that the water committee of the city of Portland were going to take bids on the 1st of March, 1893—for the purpose of ascertaining how large a check would be required to accompany our bid for each contract that was to be let. The paper shows on its face—it shows under each item certified check, \$850.00 to \$1,500.00 on the first item.

Q. I will ask you to state whether or not the figures there appertaining to the manufacture and laying of pipe from the head works to Mt. Tabor were designed for any special purpose in connection with the bids, and if so, what the purpose was.

(Counsel for defendant objects to the question as immaterial, as the paper shows for itself what it is for.)

[668] A. They were not at the time these papers were made. We had just commenced investigating the job, and we had very little data on which to predicate any calculation. I said the primary purpose was to ascertain the size of the check required. Now, I do not think it had any other purpose. I think

that was the design and calculation of the papers, because when they were made we had not the data and we did not know accurately the cost of the items which they purported to represent.

Q. I show you defendant's "Exhibit Y2"; I think you have proposed that I will ask you to state what it was designed for.

(Counsel for defendant objects to the question as immaterial, as the paper shows for itself what it is for.)

A. It was designed for my own and Mr. Hoffman's information as to Mr. Catt's judgment as to the cost of making and laying Bull Run pipe. Mr. Catt's judgment was founded on his investigation in the East and this paper was sent here to myself or to Mr. Hoffman, or to us jointly, as an exponent of his judgment on what it would cost to manufacture this pipe and it was not intended in any sense for a bid. It was a calculation to assist us in making up our minds to the sum which we would bid.

Q. You may state whether or not it was your purpose at any time to use that as a bid.

(Counsel for defendant objects to the question as immaterial.)

A. It never was. This paper was followed by additional information the next and second and third days after it came, both by letter and wire, which radically modified its application.

Q. I show the witness a telegram, which has been marked [669] by the examiner "For identification No. 4," being a telegram from George W. Catt to J. McMullen, Hotel Portland, Portland, Oregon, dated the 27th day of February, 1893; you may state what, if any, that message has with the calculation you were making for a bid on the work of manufacturing and laying steel pipe to bring Bull Run water down to Mt. Tabor.

(Counsel for defendant objects to the question as incompetent and immaterial and not rebuttal evidence.)

A. We used the information that this telegram conveyed in making up our final estimate. That is, we used all the information that we could get from every source and this is one of the sources.

Q. Did you receive that in the ordinary course of transmission?

A. Yes, I think I received that the day it was dated.

(Objected to by defendant as incompetent, immaterial, and not rebutting evidence. Counsel for complainant offers in evidence the paper last shown to the witness and the same is received and filed marked, "Complainant's Exhibit No. 29," G. A. B., Ex.)

Q. I show the witness a letter, which has been previously marked "For identification No. 5," bearing date New York, February 22 or 21 (as there are duplicate dated), '93, addressed "J. McMullen, President San Francisco Bridge Company, San Francisco and Portland," signed "San Francisco Bridge Company by George W. Catt"; did you receive that letter in the ordinary course of the mail? A. I did.

Q. I will ask you to state what the paper is referred to there as "Bid DDD."

[370] A. I think it was the paper in evidence here, "Defendant's Exhibit Y2."

(Counsel for complainant offers in evidence the paper last shown to the witness. Objected to by defendant as incompetent, immaterial, and irrelevant and not rebuttal evidence. The same is received and filed, marked "Complainant's Exhibit No. 30," G. A. B., Ex.)

Q. I show witness a letter which was previously marked "For identification No. 6," dated New York, February 22nd, 1893, addressed J. McMullen, President San Francisco Bridge Company, San Francisco and Portland," signed "San Francisco Bridge Company, by George W. Catt"; did you receive that in the ordinary course of business? A. I did.

Q. To what business did it relate?

(Counsel for defendant object to the question as immaterial.)

A. It related to Mr. Catt's calculation and estimate on the pipe line job.

Q. On the second page there is reference to bid DDD, what does that refer to, do you know?

A. That refers to the papers in evidence here as "Defendant's Exhibit Y2."

(Counsel for defendant, in addition to the objections heretofore made, now object to all letters received, on the ground that they are letters received by the witness himself from his own employees and contain declarations to himself by his own employees, and are incompetent, irrelevant, and immaterial

Counsel for complainant offers in evidence so much of the letter referred to as is found on the second page commencing with [671] the words, "Bid DDD," and ending with the words "You may think different about them." Objected to by defendant as incompetent, immaterial, and irrelevant. Paper referred to is received in evidence, filed, and marked "Complainant's Exhibit No. 31," G. A. B., Ex.)

Q. I show the witness a telegram, dated "San Francisco, Cal., 31 '93," addressed "J. McMullen, Portland, Hotel," signed H. S. Wood; state whether you received that in the ordinary course of telegraphic transmission. A. I did.

Q. To what work did it relate?

A. It related to the estimate on the work of laying the Bull Run pipe line.

(Counsel for complainant offers in evidence that portion of the dispatch pertaining to this work of manufacturing and laying steel pipe which reads as follows: "Making and laying three and five four five thousandths cents on net plate weight seems high on shop work and plant by a quarter cent." Counsel for defendant objects to introduction of the same in evidence on the ground that it is incompetent and immaterial, and further suggests that if the paper is admitted the whole of the dispatch from the beginning ought to be received. Counsel for complainant states that he is willing the defendant may offer the entire dispatch or that it may otherwise be received in evidence, but complaint only offers in evidence so much of it as relates to the manufacture and laying of this pipe. The paper referred to is received in evidence and marked "Complainant's Exhibit No. 32," G. A. B., Ex.)

Q. I show the witness a letter dated New York, February [672] 21st, 1893, addressed "J. McMullen, President San Francisco Bridge Company, San Francisco and Portland," signed "San Francisco Bridge Company, by George W. Catt"; did you receive that letter in the ordinary course of business?

A. I did.

Q. To what did it relate?

(Objected to by counsel for defendant on the ground that the letter shows for itself and as being immaterial.)

A. It relates to the calculation that Mr. Catt had previously sent me—the paper "Exhibit Y2" for the cost of the manufacture and laying of pipe.

(Counsel for complainant offers in evidence the paper last shown to the witness. Counsel for defendant objects to the same as being incompetent, being a declaration by the complainant or persons in his employ in his favor, as immaterial and not rebutting evidence. The paper referred to is received and filed marked "Complainant's Exhibit No. 33," G. A. B., Ex.)

Q. I show the witness a letter, dated New York, February 21st, 1893, addressed "J. McMullen, President San Francisco Bridge Company, San Francisco and Portland," and signed "San Francisco Bridge Company, by George W. Catt"; did you receive that letter in the ordinary course of mail?

A. I did. (Signed) J. McMullen.

Q. To what work does it relate?

(Objected to by counsel for defendant, on the ground that the letter shows for itself and as being immaterial.)

A. It relates to the estimates that Mr. Catt made for the manufacture and laying of pipe "Exhibit Y2."

(Counsel for complainant offer in evidence the paper last [673] shown the witness. Counsel for defendant objects to the same as incompetent, being a declaration by the complainant or persons in his employ in his favor, as immaterial and not rebutting evidence. The paper referred to is received and filed, marked "Complainant's Exhibit No. 34," G. A. B., Ex.)

Q. I show the witness a letter dated New York, February 21st, 1893, addressed "J. McMullen, President San Francisco Bridge Co., San Francisco and Portland," signed "San Francisco Bridge Company, by George W. Catt"; did you receive that letter in the ordinary course of business mail?

A. I did.

Q. To what does the last paragraph relate?

(Objected to by counsel for defendant as immaterial and on the ground that the letter shows for itself.)

A. It relates to calculation of the cost of manufacturing and laying the pipe—"Defendant's Exhibit Y2."

(Counsel for complainant offer in evidence the following paragraph of the letter referred to, to-wit: "We enclose herewith copy of letter from Fuller Bros. & Co., 139 Greenwich St., New York, reference to steel rivets, which is the best price we have up to date." Counsel for defendant objects to the same as incompetent, being a declaration by the complainant or persons

in his employ in his favor, as immaterial and not rebutting evidence. The paper referred to is received and filed marked "Complainant's Exhibit No. 35," G. A. B., Ex.)

Q. I show you a letter dated New York, February 21st, 1893, having a similar address and signed in the same manner; to what work does that relate?

[674] Objected to by counsel for the defendant as immaterial and on the ground that the letter shows for itself.)

A. It relates to the estimates of Mr. Catt on the cost of manufacturing and laying this pipe—"Defendant's Exhibit Y2."

Q. Did you receive it in the ordinary course of mail?

A. I did.

(Counsel for complainant offers in evidence the paper last shown to the witness. Counsel for defendant objects to the same as incompetent, being a declaration by the complainant or persons in his employ in his favor, as immaterial and not rebutting evidence. The paper referred to is received and filed marked "Complainant's Exhibit No. 36," G. A. B., Ex.)

Q. I show the witness a letter dated New York, February 21st, 1893, same address, same signature; did you receive that letter in the ordinary course of mail? A. I did.

Q. To what work did that relate?

(Objected to by counsel for defendant as immaterial and on the ground that the letter shows for itself.)

A. It relates to Mr. Catt's calculations as to cost of manufacturing and laying pipe—"Defendant's Exhibit Y2."

(Counsel for complainant offers in evidence the paper last shown to the witness. Counsel for defendant objects to the same as incompetent, being a declaration by the complainant or persons in his employ in his favor, as immaterial and not rebutting evidence. The paper referred to is received and filed marked "Complainant's Exhibit No. 37," G. A. B., Ex.)

[675] Q. I show the witness a letter dated New York, February 22nd, 1893, same address and same signature; state whether or not you received that letter in the ordinary course of mail.

A. I did.

Q. To what does it relate?

(Objected to by counsel for defendant as immaterial and on the ground that the letter shows for itself.)

A. It relates to Mr. Catt's calculations or estimate of the

cost of manufacturing and laying pipe—"Defendant's Exhibit Y2."

(Counsel for complainant offers in evidence the letter last shewn the witness. Counsel for defendant objects to the same as incompetent, being a declaration by the complainant or persons in his employ in his favor, as immaterial and not rebutting evidence. The letter referred to is received and filed marked "Complainant's Exhibit No. 38," G. A. B., Ex.)

Q. Mr. McMullen explain the significance of those letters offered in evidence being addressed to both Portland and San Francisco and Portland.

[676] (Question objected to as immaterial.)

A. The copy that was sent to Portland was sent here because the signer knew that I would be here at the time, and the copy that was sent to San Francisco was simply sent for the information of that office.

Q. I will ask you to state whether or not you got a copy of these letters and telegrams at the time the bids were submitted by yourself and Hoffman on the manufacture and laying of this pipe? A. I did.

Cross-Examination.

Questions by Mr. MALLORY:

Q. These papers to which your attention was drawn—I think it was "Defendant's Exhibit U2 and V2"—by whom was the original of them made, if you know?

A. Do you mean the clerical work?

Q. The estimate itself of the Engineer.

A. By Mr. Wood, I think.

Q. You say at that time Mr. Wood did not know and did not have the data from which to make any accurate estimate of the costs of the work? A. I said so; yes, sir.

Q. That you state as a fact.

A. I think that is correct, sir.

Q. So on the question of the manufacture of the pipes you did not have sufficient data to know what it would cost, did you?

A. I think Mr. Wood made those, as I testified on my direct examination, to find out approximately the size of the different contracts that the committee was going to take bids on, for the

purpose of ascertaining how large a check it would be necessary for me to bring with me.

Q. You have stated that before. I ask you now whether or not he had sufficient information to enable him to form an opinion as an engineer as to what would be the cost of manufacturing the pipes.

[677] A. He had some information, but he did not have full and complete information which was subsequently received.

Q. Referring to that portion of your testimony which begins with the remark, "I would like to say right here," I would like to ask you to state who was present when you had the conversation that you have referred to between yourself and Mr. Hoffman.

A. I do not remember that any one was present. I think that one of the conversations on that subject took place in the old Hamman Baths down on First street. We went down there one evening together to take a bath.

Q. I did not ask you where; I asked you who was present.

A. I do not remember that any one was present.

Q. You make these statements now, Mr. McMullen, with the entire realization of the fact that Mr. Hoffman has been dead for six months, and cannot confront them if they are not true.

A. My dear sir, I made these statements when Mr. Hoffman was alive, and I made them in ink, and you have got them in this case.

Q. I want to ask the witness if he knows to what the words "Bid A." refer which appear in one of the telegrams here.

A. I do not know, but I think if you take the water committee's specifications you can find out what "Bid A" is. I have not got it in mind; I suppose it refers to that letter of the specifications, although it might not, because Mr. Catt has taken "D D D," which is not a letter used in the specifications. It is a letter which he adopted himself to designate between iron conduit and steel conduit. Now, there might be something in the correspondence that will show what "Bid A" refers to. It might refer to a letter in the specifications.

[678]

Redirect Examination.

Questions by Mr. L. B. COX:

Q. What is the fact about the engineer of the water committee sending out printed proposals for different parts of the work, which was scheduled as "Bids A, B, C, D, etc."?

A. He did send out such printed specifications and a blank for proposals.

Recross-Examination.

Questions by Mr. R. MALLORY:

Q. When did he send these and when did you receive them?

A. Well, I think we received the specifications in which those letters were used almost immediately when they were published—in probably two or three weeks.

Q. Mr. Wood when he made this estimate must have had those specifications before hand.

A. Yes; Mr. Wood must have in all probability have had the specifications in San Francisco.

Q. That was the same specification that Mr. Catt had before him when he made his estimate?

A. I think so; yes, sir.

Q. And Mr Bush?

A. Yes; I do not think there was but the one specification which was on a printed form. I know that we got them.

[679] Witness excused.

Whereupon the taking of testimony herein is adjourned until to-morrow, February 1st, 1896, at 10 o'clock A. M.

(Signed)

GEO. A. BRODIE,

Examiner.

(Signed)

J. McMULLEN.

Office of G. A. Brodie, Portland, Oregon.

February 1, 1896, ten o'clock A. M.

At this time, pursuant to adjournment, appear the parties herein as before, the complainant by Mr. L. B. Cox, of counsel, and the defendant by Mr. R. Mallory, of counsel, and thereupon the following proceedings are had, to-wit:

JOHN B. DAVID is called as a witness for the complainant on rebuttal, and being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. L. B. COX:

Q. What is your occupation, Mr David?

A. Well, now I am farming.

Q. Have you ever had anything to do with contract work?

680] A. Yes, I have been about all my life up to the last three years.

Q. What length of time have you followed that business?

A. Well, about twenty-five years.

Q. What has been the nature of the contracts with which you have been connected—enumerate some of them?

A. Well, I built roads—Government works of different kinds, improvements, mill construction, railroads, etc.—general contract work.

Q. State the magnitude in money of some of the contracts that you have been connected with.

A. Well, the largest contract was building the road from Pendleton to Huntington. I was with Mr. Steel and Mr. Thompson; I had a quarter interest in it.

Q. What was the amount of money involved in that contract?

A. Well, something over three million dollars.

Q. Name the amount of some other contracts approximately.

A. Well, we were interested in different contracts here in Government work, from fifty to one hundred and fifty thousand dollar contracts.

Q. Did you have anything to do with the contract of supplying stone to the government for work on the Columbia River?

A. Yes, I had an interest in that contract.

Q. Who were your associates?

A. Mr. Hinkle, Mr. Thompson, and Mr. Hoffman.

Q. Lee Hoffman? A. Yes, sir.

[681] Q. What was the amount of that contract, do you remember?

A. Well, the amount of the contract was \$50,000.00, but we did about \$150,000.00 worth of work; it run along from one year to another. We also had a contract before that for putting in these dykes and the work done here on the Willamette river, under Colonel Gillespie, which amounted to about \$75,000.00---Joe Pacquet, Joe Smith and I.

Q. Have you been familiar during the time that you have been engaged in these contracts with what would be the reasonable price for the services of a superintendent and general manager?

A. Well, yes, to a certain extent I have kept myself pretty well posted.

Q. Where were you in the summer of 1893?

A. I was here in Portland.

Q. What was the financial condition here in Portland and generally throughout the country during that summer commencing along in July?

A. Well, it was pretty uncertain; that was the beginning of the panic; I would say it was panicky.

Q. And after the panic how was money?

A. Well, money was pretty hard to get hold of---was very close.

Q. What effect did that have, if any, on salaries, wages, the compensation paid for services, and everything of that sort?

[682] (Counsel for defendant objects to the question as immaterial, unless it is limited to the matter of services as persons engaged as manager in charge of contracts, and having control of men, and furnishing means.

A. Well, at that time of the year I do not think it had very much effect upon people who had positions of trust, and so forth, because it had not run quite far enough, but it affected common labor; for instance, before that men who were employed at \$2.50 a day during that time it was a dollar and a dollar and a half; it nearly cut their wages in two; but for superintendent I do not think it affected their wages very much at that time.

Q. I desire to submit this question to you, Mr. David, and take your opinion upon it: Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland, under a contract which stood in Hoffman's name. The contract price was \$465,667.00, and the contractor was required to furnish a bond in the sum of \$140,000.00, which bond was secured by Hoffman, the securities being two in number, one a former partner of Hoffman's, and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen each of them was to contribute an equal amount of the capital to the prosecution of the enterprise, and they were to share equally in its profits and losses. It was also agreed that Hoffman, being a resident of the city of Portland should be the active superintendent of the work, but that McMullen, who resided in San Francisco and controlled offices there and in New York and in Seattle, should render all services which should be required of him at those points. The work of manufacturing the pipe was sublet at a price of about \$180,000.00, and the work of hauling the pipe into position was also sublet at a price of about \$36,000.00. The work was actually begun in June, 1893, and between March 10, 1893,—the date of Hoffman's contract with the water committee—and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and collecting plant, laborers, etc., and McMullen working on the same thing from San Francisco, Seattle and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendency of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated until September 20, 1893. During this time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work was also engaged in other contract operations. Of the plant, consisting of implements, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20th, 1893, Hoffman found 2-3 and McMullen 1-3, the value of the latter being estimated from \$1,609.00 to \$2,300.00. Owing to his inex-

[684] perience in such work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made by Hoffman, except in the matter of furnishing money, until September 20th, 1893. During this time an engineer and a superintendent of the field work together with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20, 1893, McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned; but Hoffman advanced from his private means at various times in the months of June, July and August, 1893, the sum of \$14,500.00 or thereabouts, which was covered by his estimate paid by the water committee on September 21, 1893, and thereafter Hoffman did not have, or need not have had, any money of his own in the job. Money was very tight, and salaries and wages were affected thereby as you have testified. In the partnership contract between Hoffman and McMullen, there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts what do you deem to be a proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen during the period of time between March 6, and September 20, 1893?

(Counsel for defendant objects to the question for the same reasons as made to the same question when propounded to other witnesses.)

A. Well, the ordinary wages for people superintending that kind of contract is from \$200 to \$400 a month. Of course his putting up money that has no effect upon his wages or upon his salary, that is a matter independent of that. I should think \$400 a month would be a fair compensation.

[685] Q. Do you know, Mr. David, within your own experience, any instance in which salaries were allowed to persons occupying toward other pieces of work the relation which Hoffman occupied towards this work, as indicated in the question just submitted?

(Counsel for defendant objects to the question as irrelevant and immaterial.)

A. Well, I do not know of any such large contract; of course, I know other men were working on the same contract --that is, this same general contract with the water commit-

tee, and the salaries that they got. For instance, Mr. Hinkle, who superintended the laying of pipe across there, he got \$10.00 a day, while he was at work, and he was interested in the contract with the other boys. They arranged that themselves, all three of the contractors were under wages—under salary.

Q. Do you know of any instance in which one member of the firm or stockholder in the corporation which had a contract who acted as superintendent and general manager, and was allowed a salary for such services?

(Same objection.)

A. Yes, I know of a number of cases of that kind; I have had some experience with them myself.

Q. Give us the benefit of your observation?

(Same objection.)

A. Well, when we were in the government work furnishing stone, we paid Mr. Hinkle, who took charge of it, \$150.00 a month, and his expenses, and Mr. Hoffman was one of the partners, and when we were working on the railroad and doing the railroad work there, Mr. Bates, who was superintendent, got \$250.00 a month for general superintendent of the work.

Q. What interest had Bates in the work?

86] A. He had a 1-3 interest.

Q. What was the magnitude of the work that he performed?

A. He did that work from Pendleton to the summit of the Blue Mountains. It was pretty heavy railroad work and he had from eleven to twelve hundred men under him.

Q. What was the cost of that work.

A. I do not know exactly what his payroll was.

Q. The contract—what was your estimate as a whole?

A. Well, you know we did it at so much per yard; I cannot tell you exactly.

Q. Approximate it.

A. The estimate would go from \$65,000.00 to \$150,000 a month.

Q. How long did that last?

A. We were about eight months in finishing it; but of course, it did not run that all the time; the fore part it was smaller, and the latter part it was smaller, but during that

time there were two or three months that run from \$65,000.00 to \$150,000.00 a month.

Q. What was Hinkle doing in superintending this work that you described?

A. He had the getting out of this rock, and opening up the quarry. I suppose our plant cost about \$25,000; we kept sixty-five or seventy men there.

Q. Well, what was his duties—how much latitude was there in his action—what did he have to do?

A. He had it all to do; we had nothing to do with it at all, [687] except we went in and furnished the bond, and he did the business.

Q. Now, then, do you know of any other instances except these two.

A. Well, I have known of other instances, but I do not call them to mind. This work that we done down here on the Willamette under Col. Gillespie, we bired an outside man who was not interested.

(Counsel for defendant here enters a general objection to all questions propounded to this witness, on the ground that the same are immaterial, irrelevant.)

Cross-Examination.

Questions by Mr. R. MALLORY:

Q. When Mr. Hinkle was acting as superintendent, as you spoke of him, he was simply superintendent of the works: he was not responsible in any way by having to provide money for the men at all; the matter of paying them was the business of the Company, and he had nothing to do with that, did he—providing the money to pay them?

A. No, he had nothing to do with providing the money of course, he regulated the wages, and all that.

Q. But with providing the money to pay them he had nothing to do?

A. No more than the rest of us.

Q. Simply the corporation did it, or the company?

A. Yes.

Q. So that his duties as a superintendent did not make it [688] incumbent upon him to look out for funds to pay the men?

A. No, no more than his interest as a member of the company.

Q. In the case of Mr. Bates, his services were simply that of a superintendent engaged in controlling the men?

A. Yes, sir.

Q. And in directing the work?

A. Yes, sir.

Q. So far as looking out for funds to pay the men, he had nothing to do with that?

A. No more than simply to provide his part.

Q. As a member of the company? A. Yes.

Q. In case of failure, it was not a matter that devolved upon him as superintendent—he would not suffer from that he had not responsibility on that account? A. No.

Q. So that the services these men that you referred to performed, and the wages paid to them was simply to look after and carry on the work, and see that the men did the work properly and were kept employed, and were made to do as much work as they could to get the best results from the men that were employed?

A. Yes. Well, Mr. Hinkle was a little different from Mr. Bates; Mr. Bates did not have to do anything with the planning, that was furnished by the engineer of the railroad company, but Mr. Hinkle had to do his own planning—he did everything except furnishing the money.

389] Q. The work he had to do was to plan the getting out of the stone? A. Yes, sir.

Q. How he would get the stone out, that was this work?

A. Yes, sir.

Q. Now, Mr. David, suppose the water committee of the city of Portland awarded to Mr. Hoffman, under the name of Hoffman & Bates, a contract for manufacturing and laying pipe for conducting water from the head works at Bull Run to Mt. Tabor, for which it was agreed that Hoffman should be paid \$465,667.00, and a bond was required of Mr. Hoffman to the amount of \$140,000.00. There was a contract of copartnership entered into between McMullen and Hoffman, the complainant and defendant in this suit by which it was agreed that each would put up one-half the money necessary to carry on the work, and should share the profits of the work if there were any. Hoffman living in Portland was to have charge and management of the business, and McMullen not living in the city was to give such aid as Mr. Hoffman should

ask him to at points where he did business. Mr. McMullen did not give and refused to give any assistance in procuring a bond. Mr. Hoffman had to furnish the bond entirely himself, and Mr. McMullen did not even sign it, and was under no obligation, so far as the bond was concerned, to the city water committee at all. Mr. McMullen or the San Francisco Bridge Company of which he was the managing director and principal stockholder, had a lot of tools, camp equipments and utensils necessary for work of this sort, at Seattle, the value of which was from \$1,200 to 1,500, which was turned over to Mr. Hoffman to help carry on the work. Mr. McMullen, at the request of Mr. Hoffman, purchased in New York a hydraulic punch and shears, the cost of which [690] was about \$300.00; he also purchased, at the request of Mr. Hoffman, some portable forges in San Francisco; a dozen or more; that these were paid for out of the funds of the company. Between the first of March and the first of June, Mr. Hoffman had to prepare for manufacturing the pipe, either to do it themselves—himself and McMullen, or to let a contract to have it done; he let a contract to Wolff & Zwicker, the amount of which was about \$180,000.00. He also provided for hauling the pipe from the place of manufacture, to the place of use, and for that purpose made a contract amounting to about \$36,000.00. This work was done by him between the 1st of March, and the 1st of June. The work of laying the pipe actually begun in the month of June and between June and September 20th Mr. Hoffman put into the concern about \$14,500. Mr. McMullen did not put in a dollar other than that named. And when requested by Mr. Hoffman to put up his proportion according to contract, he refused to do so, and in his refusal complained of Hoffman because he paid his bills, and provided money for that purpose, and did not send them off—not referring to his payrolls; but to other contracts—supply contracts. Payments were made for the work upon estimates furnished by the chief engineer of the water committee. The amount of bills to be paid on the 20th of September would have been about twenty thousand dollars or a little more. On the 20th of September, Mr. Hoffman was invited by the water committee to be present at a meeting of said committee, and was then and there notified that there was no certainty that any bonds would be sold or that any money

391] could be had to pay the obligations due on the 20th of September, in consequence of which Mr. Hoffman having a large number of persons in his employ, was obliged to provide for money to meet these obligations, and did in fact, make provisions for procuring it—collected all the money he could get of his own, and in fine had the entire responsibility of this contract on his own shoulders. The work was carried to a successful conclusion, and according to the showing of the books, a large profit was realized from the investment. Mr. Hoffman's whole attention was directed to and actually applied to the management of this business, not however, so much that he could not look after his ordinary business. Mr. McMullen was entirely at liberty to attend to his own affairs and prosecute his other business as he pleased, only being expected to do such things as Mr. Hoffman might ask him to do, and he did in fact ask him to do some chores, such as has been named, and consulted with Mr. McMullen with reference to the business as it went along. Now, under these circumstances I will ask you to state what in your judgment was the value of Mr. Hoffman's services to that concern.

(Counsel for complainant objects to the question, on the ground that it presents an incorrect and incomplete statement of facts as shown by the evidence.)

A. Well, that is a peculiar situation; of course, so far as providing for those means and all that thing is concerned, that should be paid for. That seems to me to be a matter by itself. I do not know how, whether it should be paid for in a salary or in any other way, that is a pretty hard question.

[692] Q. I will put this question to you: in view of the circumstances which I have stated to you substantially, would you think that it was any more than fair compensation to Mr. Hoffman for Mr. McMullen to allow him out of his share for doing that work a salary of \$500 a month, leaving Mr. McMullen free to attend to his own business?

(Same objection.)

A. No, I do not think that would be unreasonable. If that would cover the accommodation of furnishing the money, I think it would be worth a little more for putting up that money and keeping the work going.

Q. I am asking you to take into consideration the responsibility of the position, and the liability that Mr. Hoffman

would incur to his employees upon the ground—taking the responsibility that such a person does under such circumstances, and you know the temper of the people who are employed in such contracts of that kind, and taking all these things into consideration, I ask you to state whether the fact that Mr. McMullen was entirely away from the work and away from all that responsibility, and had his mind free to look after his own private affairs—whether \$500 a month from him would not be reasonable compensation.

(Counsel for complainant objects to the question, on the ground that it is based upon an incomplete statement of facts, and as appears by the evidence, and as immaterial.)

A. Well, the question there about furnishing the money cannot enter into the question of salary, it seems to me.

[693] Q. I do not ask you about that; I want you to consider the responsibility—what his services were worth when he had that responsibility upon his mind; the money itself is a different item.

A. I suppose that \$500 a month would not be too much under those circumstances, taking the whole thing into consideration.

Redirect Examination.

Questions by Mr. L. B. COX:

Q. Now, Mr. David, you are assuming in giving that answer that Mr. Hoffman was entirely and solely liable for any miscarriage of the contract, and that any loss which might have occurred would fall upon him, and McMullen was powerless to render him any aid, and had thrown the whole thing upon Mr. Hoffman, and that Hoffman had had a greater burden imposed upon him than he ought to have had under his contract, are you not?

A. Yes.

Q. Now, what would you say if the contract between McMullen and Hoffman was that Hoffman by their agreement was to act as general superintendent and to do whatever was required to be done or would have been required to be done by a superintendent or general manager of the work, and that McMullen, as his partner was just as much responsible for any loss that might have fallen on account of the job as Hoffman was, and would have had to stand half of it, and that McMullen's failure to sup-

ply money was on account of his inability to raise it owing to the financial panic of 1893, and that the whole trouble Mr. Hoffman had was with regard to his September payment [694] which was made him in full by the water committee, he owing at that time about twenty-one thousand five hundred dollars, and the payment to him by the water committee was sixty-six thousand seven hundred dollars, and he never thereafter had a dollar in the job, but on the 20th of September, he assumed the entire management of the job, and undertook to oust his partner out of it, that the only money that he advanced was fourteen thousand five hundred dollars, half of which was incumbent upon him to advance, and that was in the job only about sixty days on an average—under those conditions would the first estimate which you gave be influenced any?

A. Well, as I said in the beginning, take an ordinary contract four hundred dollars or three hundred and fifty dollars a month is a little above the average wages. But to provide for those contingencies, of course, I cannot tell you; I am not well enough posted on the contingencies, the way you recite it and the way Mr. Mallory recites it, to give an opinion.

Q. Now, you have given one opinion.

A. Yes, but if he is called upon, under those circumstances, and he has to rustle, and to make provision for all those conditions, and under the conditions that existed at that time, and it required extraordinary effort on his part, and of course I presume he had to sacrifice some things in order to do it; I know I had to in order to raise money.

Q. You are taking that into consideration?

A. I am taking that into consideration, and basing my opinion on the condition of affairs at that time. [695]

Q. Now, Mr. David, assuming the condition of affairs and circumstances under which Mr. Hoffman was placed, were as indicated in my last question, what would you say?

A. As I say, four hundred dollars a month would be a good salary—a fair salary, and more than average salary—about three hundred dollars a month was the average salary for a man to take that place.

Q. Do you think that would cover all the compensation which should be allowed Mr. Hoffman under the condition of affairs which I have recited? A. Yes.

Q. Now, Mr. David, you say that Bates in his contract had

no responsibility as to money, and Hinkle had no responsibility as to money, or losses—each one of them was responsible, was he not, in proportion to his interest in the contract?

A. Yes, that is what I said.

Recross-Examination.

Questions by Mr. R. MALLORY:

Q. I did not ask you, Mr. David, whether Mr. Bates or Mr. Hinkle were responsible for losses; what I asked you was if, under their agreement to superintend, they had any responsibility about furnishing the money—if that was part of their contract as superintendent at all.

A. Well, they were interested in the contract as partners.

Q. That was a different matter; their contract as superintendent was an entirely different matter from their interest in the partnership—that is, when Mr. Bates and Mr. Hinkle were employed as superintendent of this work; it was not a part of their business as such superintendent or manager to go out and hunt up money to be ready to pay the men when their wages became due?

A. No, sir.

(Signed)

JOHN B. DAVID.

Witness excused.

Complainant Rests.

(Signed)

Defendant Rests.

GEO. A. BRODIE, Examiner.

United States of America, }
District of Oregon. } ss.

I, Geo. A. Brodie, U. S. Examiner of the Circuit and District Courts of the United States for the District of Oregon, do hereby certify that on the 7th day of January, 1896, at the hour of 2 o'clock P. M., there appeared before me, at my office in the city of Portland in the district aforesaid, the complainant herein by Mr. L. B. Cox, of counsel, and the defendant herein by Mr. Rufus Mallory, of counsel, and thereupon I proceeded to take the testimony of the respective parties herein, and not having completed the same upon said day the taking of said testimony was adjourned from day to day until the 1st day of February, 1896, when the taking of said testimony was com-

[697] pleted by the respective parties in the above-entitled cause. That by agreement of the parties herein said testimony was taken by question and answer, first by me in shorthand and thereafter transcribed upon the typewriter. That before proceeding with the taking of the testimony of the respective witnesses they and each of them were by me duly sworn to tell the truth, the whole truth and nothing but the truth in answer to interrogatories and cross interrogatories to be propounded to them; that after the said testimony was taken and transcribed as aforesaid, the same was by said respective witnesses read over and signed by them respectively in my presence. I further certify that the foregoing is the testimony so taken by me together with the exhibits introduced by the respective parties during the taking of said testimony. That at each and all of the hearings before me for the taking of said testimony the complainant appeared by Mr. L. B. Cox, of counsel, and the defendant by Mr. Rufus Mallory, of counsel.

In witness whereof I have hereunto set my hand this 6th day of February, 1896.

(Signed)

GEO. A. BRODIE,
U. S. Examiner

Complainant's Exhibit No. 1.

McMULLEN, }
vs. }
HOFFMAN. }

[698] This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run Water system for Portland, submitted the lowest bid for said work and expects to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid.

It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to fur-

Julia E. Hoffman, Executrix, etc.

and pay one-half of the expenses of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom;

And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland the profits and losses thereof shall in the same maner be shared and borne by said parties equally share and share alike.

Witness our hands and seals this 6th day of March, A. D. 1893.

JOHN McMULLEN. (Seal)

LEE HOFFMAN. (Seal)

In presence of:

P. L. Willis,

R. E. Sewall.

[699] [Endorsed: Filed Feb. 20, 1896. J. A. Sladen, Clerk.]

Complainant's Exhibit 15

Portland, Or. Jan. 1, 1894.

Hoffman & Bates, Contractors, Dr., To Lee Hoffman.

For salary from May 1st, 1893, to Jan. 1st, 1894, as per bill attached, \$8,000.00, eight months at 1000.00 per mo. -

H. & B., Dr., To Lee Hoffman.

For salary from May 1st, 1893, to Jan. 1st, 1894. Eight months. \$1,000 per month, \$8,000.

Jan. 10, 1894.

Received from Hoffman & Bates, Eight thousand dollars, in full for above account.

LEE HOFFMAN.

[Endorsed]:

Hoffman & Bates, Contractors.

Registered in General Office. No. 514. \$8,000.00

Name Lee Hoffman, Place, Portland, Ore

For salary to Jan. 1st, 1894. Month of Jan. 94.

When paid, Jany. 10th, 1894.

Chargeable to Incidentals (Bull Run Pipe Line), \$8,000.

I certify that the within account is correct. A. Donnell.

Computations examined by E. M. Arthur. Approved, Lee Hoffman.

McMullen v. Hoffman, Compts. Ex. 15, Filed Jan. 15th, 1896,
G. A. B., Ex.

Filed Feb. 29, 1896. J. A. Sladen, Clerk.

[700]

Portland, Oregon, Sept. 30, 1894.

Hoffman & Bates, Contractors, Dr., To Lee Hoffman.

For salary from Bull Run Pipe Line contract,

for the year ending January 1, 1895.12,000.00

For credit balance, as per Ledger account,

page 51, General Ledger15,663.30

\$27,663.30

Complainant's Exhibit 16.

Portland, Ore., Oct. 12, 1894.

Received from Hoffman & Bates, twenty-seven thousand six hundred and sixty-three and 30-100 dollars, in full for above account.

LEE HOFFMAN.

[Endorsed]:

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Registered in General Office. No. 1009, \$27,663.30.

Name, Lee Hoffman, Place, Portland, Oregon.

For salary and ledger bal. Month of Sept. account 94.

When paid, Oct. 12, 1894.

Chargeable to (Bull Run Pipe Line.)

Incidentals, 12,000.

Lee Hoffman account, 15,663.30.

I certify that that the within account is correct, A. Donnell.

Computations examined by E. M. Arthur.

Approved, Lee Hoffman.

McMullen v. Hoffman, Compls. Ex. 16. Filed Jan. 15, 1896
G. A. B., Ex

Filed Feb. 29, 1896. J. A. Sladen, Clerk.

[701]

Complainant's Exhibit 17.

Portland, Or., Jan. 14, 1895.

Hoffman & Bates, Contractors, Dr., To Lee Hoffman.

Received from Hoffman & Bates, eight thousand eight hundred fifty-five and 4-100 dollars, in full for above account.

Julia E. Hoffman, Executrix, etc.

[Endorsed]:

Hoffman & Bates, Contractors.

Registered in General Office. No. 1176, \$8,855.04.

Name, Lee Hoffman, Place, Office, For advance.

Mon of Jan. account, '95. When paid, Jan. 14th, 1895.

Chargeable to (Bull Run Pipe Line). Lee H. 8,855.04.

I certify that the within account is correct, A. Donnell.

Computations examined by D.

Approved Lee Hoffman.

McMullen v. Hoffman, Compls. Ex. 17. Filed Jan. 15th, 1896. G. A. B., Ex.

Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 18.

[702]

Portland, Or., Feby 9, 1895.

Hoffman & Bates, Contractors, Dr., To Lee Hoffman.

Advanced, to be deposited with Ladd & Tilton for 3 months on 3% interest bearing certificate, \$60,000.00.

Portland, Or., Feby 9, 1895.

Received from Hoffman & Bates, sixty thousand dollars in full for above account.

[Endorsed]:

Hoffman & Bates, Contractors.

Registered in general office. No. 1197, \$60,000.

Name, Lee Hoffman, Place, Portland, Oregon.

For Adv. for deposit L. & T. Month of January account, '95.

When paid, Feb. 9, 1895.

Chargeable to (Bull Run Pipe Line) Lee H. account \$60,000.

I certify that the within account is correct. A. Donnell.

Approved, Lee Hoffman.

McMullen v. Hoffman, Compls. Ex. 18. Filed January 15th, 1896. G. A. B., Ex.

Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 21 1-2.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Portland, Oregon, March 16, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

[03] Dear Sir: Your letters of the 13th and 14th inst. at hand and contents noted. I have just heard that Wolff & Zwicker were going to buy Risdon out; this came through Buehner, but I can't say how reliable it is. I think as you do, that the Risdon will not sell out unless they get the bulk of the profit, and I would not be in favor of paying them over \$15,000. I am not as anxious now since Wolff makes the pipe, as the controlling of the shipments would do us no good now.

About the trenching, I think we might get up a machine that would do the work cheaper than you could do it with men. I would like to see Kelso and have a talk with him. I think your Mr. Wood has brains enough to plan out some kind of a machine that would do the work cheap. Mr. Grandahl of the S. P. R. R. Co. here has worked out a machine, or is working it out, that works on the same principle of a rotary Snow Plow. Put cutters on a large timber just the size of the ditch and have it work on an incline; always dig the bottom of the ditch first and then after the screw brings it to the top and conveys the earth to the sides by elevators. You see what Wood thinks about this. I think it would pay us to look into machinery for excavating.

I don't care to buy you out now. I think our contract is good, and we will make much more than you ask, but as it is a new line of work I want your assistance. From all I can learn, I believe we can put the pipe in the ditch for the prices we estimated. We got the estimate of Catt, Wood & Bush and afterwards from Dwyer and Wolff and they came out about the same.

[04] I will enclose you under separate cover contract with the city and Wolff & Zwicker all attached, also of Catt's correspondence, map of the pipe line and profile plan. I expect to get another profile plan on natural scale, as soon as it is made, and will send you a copy of it.

I think we can sublet the grading and make some money on it. Let me know what you think about subletting it.

We received the photographs you sent and think they are very good. Please accept our thanks for the same.

Mrs. Hoffman wishes to be remembered to your good wife and yourself.

Yours very truly,

LEE HOFFMAN.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 22.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Portland, August 2d, 1893.

J. McMullen, Esq., San Francisco.

Dear Sir: Yours of the 29th at hand. I think the Risdon are putting it on with their machine, and I am sure they will not make anything by it as they want some favors from us and it will come back to them, but from the way it looks now I think we will have to have it, that is I will let you know after the 5th whether we want it. The water committee have not [705] yet sold their bonds, and from present appearances I don't know if they can dispose of them. I will know by the 5th if they can raise \$100,000 to pay last month bills, and if they do I will go right ahead at the same rate we are going now, if not will shut down. I want you to let me know by wire as soon as you get this the size of the air compressor the Risdon have got and the size of the air reservoir; will the compressor run two machines with 500 feet of hose for each machine; this is the capacity we ought to have. You find out this by the Risdon folks; I suppose it is going to cost us more to rig up this machine than it will to do the thing by hand if we could get the men; we have only got 2 calkers to work and only 5 gangs of riveters, but I am not much in a sweat to put on more men until I know how the committee will act. We are getting along very well now with the work. We got three miles of pipe in the trench this last month but we have gone way behind on the trenching, but hope it will go better this month.

Yours very truly,

LEE HOFFMAN.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 23.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Portland, Oregon, April 28th, 1893.

Geo. W. Catt, Esq., V. P. San Francisco Bridge Company,
World Building, New York City.

Dear Sir: We have your letter of 18th inst. and catalogue of
[706] the W. & S. Hydraulic Co. We have decided to order one each
of the hydraulic punch and shears, as the hydraulic tools will
be much more convenient for our use, than those with long
levers.

The punch No. 1, with $2\frac{1}{2}$ in. jaw, P. 46, will answer our purpose, except it would be better if the casting had a bottom flange as shown on sketch for shears, enclosed herewith, so that it could be securely bolted down to timber on wagon on which it will be used.

Probably they will want to send us the punch with wrought iron legs as shown in catalogue. If so, these legs must be securely fastened to punch casting and provided with holes for $\frac{3}{4}$ in. bolts in the bottom ends. You have the specifications for this work which call for 8-16 in. holes for 7-16 in. rivets, 9-16 in. holes for $\frac{1}{2}$ in. rivets, 11-16 in. holes for $\frac{3}{8}$ in. rivets, so that we should have 8-16 in. dies and 15-32 in. punches for 7-16 in. rivets, 9-16 in. dies and 17-32 in. punches for $\frac{1}{2}$ in. rivets, 11-16 in. dies and 21-32 in. punches for $\frac{3}{8}$ in rivets and you had better order $\frac{1}{4}$ dozen dies and $\frac{1}{2}$ dozen punches of each size.

The hydraulic shears should be something like enclosed sketch. As we may need to split narrow sheets it would have about 6-inch gap. If we mark off the holes in bends in the field we shall not straighten them out to shear and punch them but have the bottom shear blades curved as shown for 2 diameters of pipe 33 inches and 42 inches. The 35-inch pipe is near enough to 33-inch to use same blade.

If it is going to cost much more time and money to get this casting with bottom flange as shown you may send one with good strong legs same as shown on punch.

[707] We do not see the advantage of extending lower jaw of punch as sketched by you unless you support it underneath.

We inclose copy of letter from Mr. McMullen in reference to

Julia E. Hoffman, Executrix, etc.

499

riveters, and wish you would look around a little and see if you can pick up about 20 good men. There should be a few good heaters amongst them.

Truly yours,
HOFFMAN & BATES.

B.

Complainant's Exhibit 24.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Portland, Oregon, May 16, 1893.

Geo. W. Catt, Esq., World Building, New York.

Dear Sir: Yours of the 8th inst. regarding punch and shears at hand. I think it would be well for you to take a look at those tools before they are shipped; that is, if they are made in New York, and see that they are in good working order. However, I don't suppose that the company would send us any machines that would not work.

I cannot yet say what we shall do for rivets, but expect to use bridge men as far as possible. The bridge men here have not had much experience at riveting, still if we don't get any from the east I think we shall get along with what is here.

Yours truly,
LEE HOFFMAN.

[708] [Endorsed]: Filed February 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 25.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors.

Portland, Oregon, June 3, 1893.

J. B. C. Lockwood, Esq., Engineer San Francisco Bridge Company, Seattle, Washington.

Dear Sir: Mr. Foy has arrived and after looking over the situation here has decided that we will require the following quantities of camp and commissary outfit which you have on hand:

- Dishes and cooking outfit for 100 men.
- 2 grind stones with frames complete.
- $\frac{1}{2}$ dozen 8-lb. striking hammers.
- 3 stone hammers.

- 1½ dozen mattocks.
- 4 picks.
- ½ dozen long-handle shovels.
- 6 dozen short-handle shovels.
- 1 platform scales.
- 2 wagons—the best ones.
- 3 teams of horses with harness.
- 1 saddle horse.
- 4 bars of pick steel.
- 1 dozen tin wall lamps.
- 09] 2 1-lb. cans of axle grease.
- 40 lbs. baking powder.
- 2 dozen axles.
- 8 horse brushes.
- 1 dozen curry combs.
- 1 cleaver.
- 1 lot of pickhandles.

Please ship the above goods at once, and if you have any good Wheelers or Slush scrapers send them also.

Yours truly,
HOFFMAN & BATES.

[Endorsed]: Filed February 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 26.

McMULLEN v. HOFFMAN.

An adjourned meeting of the water committee was held at the office of Ladd & Tilton in Portland on Wednesday, March 1st, 1893, at 3 P. M.

Present: Chairman Failing and Messrs. Corbett, Dekum, Dolph, Frank Hill, Johnson, Lewis, Loewenberg, Raffety and Richardson—11.

On motion the reading of the minutes of the last meeting was dispensed with.

On motion of Mr. Corbett the bidders were invited to enter the room; about 40 were present.

- 10] The clerk presented a tin box and stated: "That it contained 31 envelopes endorsed 'proposals,' all of which (except one which came by mail) had been presented by the bidders in person just before 12 o'clock noon this date the limit of time fixed

by the advertisement. As fast as the bids were handed in they were placed in the box and the latter sealed up at noon in the presence of the bidders. At 2:20 P. M. two additional envelopes endorsed 'proposals' were received with the understanding that as they were late the committee would decide whether they should be accepted."

On motion it was voted that these bids should be received.

The box was then opened and all the proposals were read in detail by the chairman.

On motion of Mr. Dolph, seconded by Mr. Corbett, the proposals were all referred to the engineer with instructions to prepare a tabulated statement of them and return all to the committee at 3 P. M. on March 2d.

Adjourned to meet at that time.

[Signed.]

HENRY FAILING, Chairman.

Attést: Frank T. Dodge, Clerk.

Pursuant to adjournment a meeting of the water committee was held at the office of Ladd & Tilton in Portland on Thursday, March 2d, 1893, at 3 P. M.

Present: Chairman Failing, and Messrs. Corbett, Dekum, Dolph, Frank, Hill, Johnson, Lewis, Loewenberg, Raffety; Richardson, and Smith—12.

On motion the reading of the minutes of the last two meetings were dispensed with.

[711] The tabulated statement of all the proposals for the different works for the water supply from Bull Run, which the committee at its last meeting directed the engineer to prepare, was presented and read. The following printed matter is a copy thereof:

Headworks: Lowest bid from John Leavens, \$7930.

Bridges: Lowest bid from Pacific Bridge Co. \$30,000.

Wrought iron plates: Lowest and only bid from Risdon Iron and Locomotive Works, \$354,702.

Manufacture and laying wrought iron pipe: Lowest bid from E. W. Jones and O. W. Wagner, \$477,961.

Steel plates: Lowest bid from Risdon Iron and Locomotive Works, \$340,971.60.

Manufacture and laying of steel pipes: Lowest bid from Hoffman & Bates, \$465,722.

For a wrought iron pipe, including the iron and manufacture the lowest combination of bids would be as follows:

Wrought iron, Risdon Iron Works	\$354,702
Manufacture, etc., E. W. Jones and O. W. Wagner ...	477,961

Total amount of the iron pipe	\$832,663
-------------------------------------	-----------

For a steel pipe, including the steel plate and the manufacture and laying, the lowest combination of bids would be as follows:

Steel plates, Risdon Iron and Locomotive Works ..	\$340,971.60
Manufacture, etc., Hoffman & Bates	465,722.00

12] Total, steel pipe	\$806,693.60
-----------------------------	--------------

Wolff, Buehner & Zwicker have made the following bid for material and manufacture of a steel pipe, excluding bricks for manholes, etc., included in other bids:

For the steel pipe, metal and manufacture.....	\$804,379.00
Add that price on bricks as stated in bid for manufacture and laying	17,400.00

Total, including bricks,	\$821,770.00
--------------------------------	--------------

Cast-iron conduit, head works to Mount Tabor: The Oregon Iron & Steel Company, \$1,430,738.

Cast-iron conduit from Mount Tabor to City Park: Lowest bid, the Oregon Iron & Steel Company, \$255,310.

Submerged pipes: Lowest bid, the San Francisco Bridge Company, \$97,340.

With a steel conduit from the head works to Mount Tabor and cast-iron pipes from Mt. Tabor to the city park, the total cost of the work included in the specifications, at the prices of the lowest bids, would be:

Head works	\$ 7,930.00
Bridges	30,000.00
Steel conduit.....	806,693.60
Cast-iron pipe to city park.....	255,310.00
Submerged pipes, cast-iron	97,340.00

Total.....	\$1,197,273.60
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[713] As the only proposal for a cast-iron conduit from the head works to Mount Tabor laid complete was \$1,430,738, which was \$624,044.40 more than the lowest proposals for a steel conduit of the same capacity laid complete, it was by vote rejected.

The only proposal for wrought-iron plates for the conduit being \$13,730.40 more than the lowest proposal for steel plates, which the engineer stated he now considered were preferable, it was voted that the conduit from the head works to Mt. Tabor should be constructed of steel plates.

As there had been no proposals submitted for "lapwelded" pipe for the submerged pipes, and as there was some uncertainty as to what was the most desirable pipe for this portion of the line, and there was no immediate necessity for this part of the line, Mr. Frank moved that all the proposals for the submerged pipes be rejected, and that they be readvertised for.

The motion carried.

Mr. Corbett moved, with the second of Mr. Dolph, that contracts be awarded to the following named parties, certified by the engineer as the lowest bidders:

J. M. Leavens, Portland, Or., head works.....	\$ 7,930.00
Pacific Bridge Co., Portland, Or., bridges	30,000.00
Risdon Iron & Locomotive Works, San Francisco, steel plates for conduit head works to Mt. Tabor	340,971.60
Hoffman & Bates, Portland, Or., manufacture and laying ditto	465,722.00
Oregon Iron & Steel Co., Portland, Or., cast-iron conduit from Mt. Tabor to City Park.....	255,310.00
Total	\$1,099,933.60

[714] On motion of Mr. Dolph, seconded by Mr. Frank, it was voted that the engineer be directed to ask the assistance of the city attorney and prepare contracts for these works in accordance with the specifications, proposals and the foregoing awards of the committee, and that the chairman and clerk be authorized to execute said contracts on behalf of the committee as soon as they are prepared and bonds are given with sureties satisfactory to the chairman. It was also voted that the clerk be directed to return to all unsuccessful bidders the certified checks deposited by them.

The following are the proposals, the successful ones being given in detail:

HEAD WORKS.

The contract was awarded J. M. Leavens, of Portland, for everything connected with the construction of the head works, as follows:

Clearing and grubbing, 2 acres, at \$150.....	\$ 300
Trees cut, 100 trees at \$1 each	100
Excavation:	
Earth, 3000 cubic yards at 21 cents	630
Loose rock, 1000 cubic yards at 35 cents.....	350
Solid rock, 7000 cubic yards at 85 cents.....	5,950
Rock under water, 100 cubic yds at \$6.....	600
Total for head works	<u>\$7,930</u>

The other bidders for the same work were as follows:

J. R. O'Neil, Portland	\$ 8,430
Perry Hinckle and Robert Wakefield, Portland.....	9,410
Bays-Jeffery Co., Portland.....	9,709
[715] Paquet & Smith, Portland	11,490
Osker Huber, Spokane.....	11,725
Charles King & Co., Tacoma	11,970
H. W. Holden, Eugene, Or.,	12,300
American Bridge & Contract Co., Portland.....	12,460
N. J. Blagen, Portland	13,200
San Francisco Bridge Co., San Francisco.....	16,550
Hoffman & Bates, Portland	17,800
Carrall-Porter Boiler & Manufacturing Co., Pittsburg...	18,600

BRIDGES.

The contracts for three bridges across Bull Run and the Sandy was awarded the Pacific Bridge Co. of Portland. Their bid in detail was as follows:

One 75-foot span bridge	\$ 1,900
One 160-foot span bridge	7,700
Cylinder piers for same	700
One 300-foot span bridge	18,500
Cylinder piers for same....	1,200
Total for three bridges	<u>\$30,000</u>

The other bidders for the bridges were as follows:

The Bullen Bridge Company, Portland	\$30,821.60
Robert Wakefield Company, Portland	30,845.00
San Francisco Bridge Co., San Francisco.....	31,279.07
Oregon Bridge Company, Portland....	31,993.00
[716] Hoffman & Bates, Portland	33,562.94
E. W. Jones and O. W. Wagner, Portland	35,948.20
Osker Huber, Spokane	37,124.80
Risdon Iron and Locomotive Works, S. F.....	39,458.80

WROUGHT-IRON PLATES.

For Conduit Head Works to Mt. Tabor.

Risdon Iron & Loco. Works, San Francisco.....	\$354,702
(No other bid.)	

STEEL CONDUIT FROM HEAD WORKS TO MT. TABOR.

The contract for furnishing the steel plates for the conduit from the head works to the Mount Tabor reservoir was awarded to the Risdon Iron and Locomotive Works, San Francisco, as follows:

Steel plates, 11,442,000 pounds at 2.98 cents,.....	\$340,971.60
---	--------------

The other bids for furnishing steel plates were as follows:

San Francisco Bridge Company, S. F.....	\$348,781
Hoffman & Bates, Portland	359,278
Osker Huber, Spokane	366,144
Perry Hinckle and Robert Wakefield, Portland.....	383,307

CONDUIT FROM HEAD WORKS TO MT. TABOR OF STEEL OR WROUGHT IRON MAKING AND LAYING THE PIPE.

[717] Messrs. Hoffman & Bates, of Portland, were awarded the contract for manufacturing and laying the pipe. Their bid in detail was as follows:

Steel, 11,442,000 pounds; rivets, 340,000 pounds 11,-	
782,000 pounds at \$0.0275	\$324,060
Manholes, 225 at \$20	4,500
Air valves, 34 at \$8	432
Bends, extra joints, 200 at \$30	6,000
Blow-offs, with six inch valves, 46 at \$20; waste	
pipes, six-inch, 29,000 pounds at \$0.10.....	3,820
Bricks, laid in cement, 580,000 at \$21.....	12,180

Two stand-pipes.

Steel plates, 15,000 pounds at \$0.08.....	1,200
Water-valves, 36-inch, one at \$500.....	500
Water valves, 33-inch, one at \$500	500
Water valves, 30-inch, two at \$350	700
Waste pipes, 30-inch, 40,000 pounds at \$0.07.....	2,800

Foundations:

Concrete or masonry, 60 cubic yards at \$10.....	600
--	-----

Sleeve joints:

Wrought-iron sleeves, 7000 pounds at \$0.07.....	490
Lead, 3000 pounds at \$0.06	180

Trestles:

Wrought-iron, 40,000 pounds at \$0.064	2,560
--	-------

Foundations:

Concrete, 400 cubic yards at \$8.....	3,200
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[718] Excavations and refilling:

Earth, 270,000 cubic yards at \$0.30.....	81,000
Loose rock, 10,000 cubic yards at \$1.50	15,000
Solid rock, 2000 cubic yards at \$3.....	6,000

Total, manufacturing and laying\$465,722

The other bids for manufacturing and laying the pipes were as follows:

E. W. Jones and O. W. Wagner, Portland.....	\$477,902
Perry Hinckle and Robert Wakefield, Portland.....	481,040
Wolff, Buehner & Zwicker, Portland, Or.....	495,682
San Francisco Bridge Co., San Francisco, Cal.....	514,664
Osker Huber, Spokane (without brick)	521,775
American Bridge Works & Bullen Bridge Co.....	533,507
Risdon Iron & Loco. Works, San Francisco.....	600,737

PROPOSALS FOR STEEL PLATES AND MANUFACTURING AND LAYING CONDUIT FROM HEAD WORKS TO MT. TABOR ALL IN ONE CONTRACT.

Wolff, Buehner & Zwicker	\$804,379
Add for 580,000 brick	71,400

Total	\$821,779
"Willamet Iron Works"	\$1,299,256

[719] CONDUIT FROM HEAD WORKS TO MT. TABOR OF CAST-IRON.

Oregon Iron & Steel Co., Portland.

Cast-iron pipe, 25,800 tons at \$32\$ 825,600

Hauling & laying 25,800 tons at \$16 412,800

Excavation and Refilling:

Earth 270,000 cu. yds. 0.49\$ 132,300

Loose rock, 10,000 cu. yds. \$0.85 8,500

Solid rock, 5,000 cu. yds. \$2.50 5,000

S and pipes, trestles, brick and specials 46,538

\$1,430,738

(No other bid.)

FROM MT. TABOR TO CITY PARK. CAST-IRON PIPE LINE.

The contract for furnishing the cast-iron pipe, man-holes, valves, etc., for the main from Mount Tabor to the reservoir in the City Park was awarded to the Oregon Iron & Steel Co. of Portland. Their bid in detail was as follows:

Cast-iron pipe delivered in Portland, 6300 tons at \$32..\$201,600

Cast-iron pipe laying ditch, 6300 tons at \$5..... 31,500

Manholes, cast-iron, 30,000 pounds at \$0.05 1,500

Blow-offs, cast-iron, 12,000 pounds at \$0.05 600

[720] Wrought-iron waste-pipe, 13,000 pounds at \$0.07.... 910

Water valves, 10-inch, 5 at \$40 200

Air-valves, 4-inch, 10 at \$10 100

Bends, cast-iron, 20,000 pounds at \$0.05..... 1,000

Excavation and refilling:

Earth, 40,000 cubic yards at \$0.36..... 14,400

Loose rock, 4000 cubic yards at \$0.50 2,000

Solid rock, 1000 cu. yds. at \$1.50 1,500

Total\$255,310

The other bidders for the same work were as follows:

San Francisco Bridge Co., S. F.....\$313,730.00

Osker Huber, Spokane, Wash..... 372,506.50

SUBMERGED PIPES.

The lowest proposal for cast-iron pipes according to the specifications was as follows:

San Francisco Bridge Co., San Francisco, Cal.

Cast-iron pipes, 1,082 tons at \$70	\$75,740
Dredging 30,000 cu. yds. at 30 cents	9,000
Laying pipes 4200 lin. ft. at \$3	12,600

Total	\$97,340
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The other proposals were: *

Jones & Wagner, Portland	\$108,700
Risdon Iron & Loco. Works, S. F.	118,974
Bullen Bridge Co., Portland	133,600
[721] Osker Huber, Spokane	146,794
Willamet Iron Works, Portland	147,811
Oregon Iron & Steel Company, cast-iron pipe, 1,082 tons at \$70	75,740
Bullen Bridge Co.	
For riveted flange joint pipe laid	79,500
For flexible flange joint pipe laid	100,500

As there were no bids for "lap-welded" iron or steel pipe all of the above were rejected.

The "Subcommittee on Construction" made a verbal report concerning the proposed reservoir in the city park and recommended that the engineer be directed to prepare a map of the site and show it to the common council, and apply for the use of the ground needed for the reservoir and the rights of way necessary in constructing and operating it.

On motion it was so voted.

On motion of Mr. Corbett, seconded by Mr. Dolph, Mr. Geo. P. Frank was appointed a member of the "Subcommittee on Construction" to fill the vacancy caused by the death of Mr. W. S. Ladd.

Adjourned.

HENRY FAILING,
Chairman.

Attest: Frank T. Dodge, Clerk.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Julia E. Hoffman, Executrix, etc.

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[722]

Complainant's Exhibit 29.**PACIFIC POSTAL TELEGRAPH-CABLE CO.**

VR. 75. Ra. R. 196 Collect.

Received at 3:15 P. M.

New York, 27th Feb., 1893.

J. McMullen, Hotel Portland, Portland, Oregon.

Errors of one thousand dollars in item forty-seven, also carried into footing bid E. Summer; freight rates will probably be five cents per hundred lower than present here to Chicago, freight rates on plate will undoubtedly be made same as pipe or reduced thirty-seven cents per hundred. Will confirm tomorrow. Hope you can keep price on item twenty-seven up to what we estimated; some of mills may have local representatives Portland which caused them to refuse to bid. It looks like we ought to make some money on plates. Last letter number twenty-seven left here; twenty-second should reach you Tuesday. We have offer from Pittsburgh parties to punch plane scarf and bend for fifty-three hundredths of cent per pound and drive rivets for seven-tenths of cent each. This is equal to seven-tenths of cent per pound for all shop work ready for calking, and includes their profit, our estimate, page one letter nineteen, is entirely safe and very close to cost to put up plant and manufacture pipe. I think it economy to do all work here possible; price on lap welded pipe does not include joints.

GEO. W. CATT.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

[723]

Complainant's Exhibit 30.

San Francisco Bridge Company, Engineers and Contractors.
World Building, New York, N. Y. San Francisco and Seattle.

New York, Feb. 21. 1893.

Portland Water Works Letter No. 25, Reference to valves. Bid
"D D D."

J. McMullen, Prest., San Francisco Bridge Co., San Francisco
& Portland.

Dear Sir: The best advice we have reference to items 35 to 37,
inclusive without having the drawings here or knowing just

John McMullen vs.

what is wanted for Portland is that these valves will cost about \$400 each and you should correct bid accordingly. Plus, also the amount of \$25.00 for laying and \$25.00 for freight. We do not recall just how these three items came to be based at \$75.00 each.

Yours truly,

SAN FRANCISCO BRIDGE CO.

By Geo. W. Catt.

[Endorsed]: McMullen vs. Hoffman. Complainants' Ex. 30.
Geo. A. B., Ex. Filed Feb. 29, 1896. J. A. Sladen, Clerk.

[724]

Complainant's Exhibit 31.

San Francisco Bridge Company, Engineers and Contractors,
World Building, New York, N. Y. San Francisco and
Seattle.

New York, Feb. 22nd, 1893.

Portland Water Works Letter No. 26, Reference to price of
manufacturing steel, and consolidated bid.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco
and Portland.

Dear Sir: In case you think favorable of having the steel
manufactured here and ship in a partially manufactured con-
dition I think we ought to estimate on doing the work at .023
c lb. instead of .024 c. lb. This would reduce the price on man-
ufactured pipe \$11,782.00.

I may be able to get a decision from the railroad company as
to just what classification they will give us on partially manu-
factured pipe, and if so will wire you. Of course that would
be on the condition that we get the furnishing of plates as well
as the manufacture.

The bids I sent you I think are safe bids for doing the work,
assuming that we should get award of any one bid. If you put
in bid on basis of taking the entire work, then my idea would
be to make a reduction as follows:

Bid "A," as per estimate sent you. No reduction.

Bid "E," item 47, I would reduce the cost of pipe delivered
on basis of shipping 5000 tons of it around the Horn, to \$40.00
per ton, or reduction of \$18,900. I would reduce item 48 \$2.00

Julia E. Hoffman, Executrix, etc.

[725] per ton, or \$12,600. Leaving items No. 49 to 54, inclusive, as they are.

Bid "G" bridges, items 60 to 64, inclusive, I would bid on material delivered at Portland, freight included at \$4.25; erection same as it is; hauling will probably cost \$.0025; profit .0045; making price per pound in structure .0545 instead of .0575; making reduction of .0003 c. per pound, or about \$1300. Items No. 65 to 68, inclusive, I have no comments.

Bid "D D," item No. 27, I would leave as already sent.

Bid "D D D," item 28, I would reduce to .023, or \$11.782.00. Items No. 29 to 33 $\frac{1}{2}$ inclusive, I have no comments. (We call your attention to the fact that item 33 $\frac{1}{2}$ is brick laid in cement and to correspond with same item of iron conduit. Do not fail to get this in your bid.) Items 34, No comments. Items 35 to 37, inclusive, as per letter No. 25, should be bid at following: Item 35, 36 in. valves, \$500; item 36, 33 in. valves, \$450; item 37 30 in. valves, \$400. This is based on quotation of Coffin Valve Co., to us. It may be that they are figuring on more expensive valve than Portland calls for. Item 38 and 39, No comments; Items 40 and 41, No comments; Items 42 to 46 are only approximate. You may think different about them.

Bid "F," submerged pipe line for consolidated bid, would reduce item 55 possibly 5 cents per yard. Would reduce item 56 cast-iron pipe delivered to \$50.00 per ton, on basis of shipment via Horn. Item 57 I would leave at \$10.00 per foot.

This covers the entire proposition for the Portland Water Works from the best information we have to-day.

[726] I would not bid on iron conduit at all for the reason that you cannot get 7 foot sheets and the cost of manufacturing would be increased over the cost of the steel pipe, and I think we can get better results from steel pipe than from iron; everything considered.

I do not know exactly what Lukens people can do, but they are the oldest firm in the United States in the making of boiler plate. Surely Carnegie Steel Co., in their material showed magnificent results in what they delivered to East Jersey Water Works Co.

We are sorry that the information sent you has dribbled

This much only offered.

along so and that we have had to write so many pages of letters, but it came in to us in such shape that it seemed advisable to do it. We are now at a little loss to know whether these letters will reach you before the letting, but the best time we can figure on it you should get them Tuesday morning at Portland, on the 7:45 train, provided they do not get delayed between here and Portland.

Yours truly,
SAN FRANCISCO BRIDGE CO.

By Geo. W. Catt.

This makes consolidated bid about \$1,240,000.00. \$40 for item 47 may be more reduction than necessary to knock out Portland on Bid E.

In consolidated bid it may be best not to insist on including Bid F.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

[727]

Complainant's Exhibit 39.

WESTERN UNION TELEGRAPH CO.

McMullen v. Hoffman.	Compl. Ex. 32.	G. A. B., Ex.
E Mc	87 Collect	10.27 A
	3-1	1893

Dated "Md" San Fran., Cal. 1

To J. McMullen, Hotel Portland.

Part in brackets only offered.

Catt's final estimate bid A, eight thousand seven hundred, seems too low; furnishing steel at three and two six-thousandths cents seems about right [making and laying three and five four five thousandths cents on net plate weight seems high on shop work and plant by a quarter cent.]— Submerged pipe compared to McNeal twenty thousand too high principally in cost of iron Bridges too low by quarter cent to include lumber piles and incidentals. Pomona man failed to connect yet. Wire chances this P. M.

H. S. WOOD.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 33 (Geo. A. B. Ex.)

[728] San Francisco Bridge Company, Engineers and Contractors,
World Building, New York, N. Y. San Francisco and
Seattle.

New York, February 21st, 1893.

Portland Water Works Letter No. 15, Reference to cost of
manufacturing pipe.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco
and Portland.

Dear Sir: Referring to letter No. 5 where I have made out in
detail somewhat the shop cost of manufacturing pipe ready for
calking, I wish to supplement that, in view of the fact that
I have some later information in reference to material and also
some better information in reference to tools. 60 men will run
all the tools, including unloading, and running the three rivet-
ers night and day, for the manufacture of 50,000 pounds of
pipe per day. This would make my estimate of labor per day
less than in my former estimate. Also I have a price on rivets,
so they would only cost us $4\frac{1}{2}$ cents per pound delivered in
Portland, which would make the average cost of rivets for 50,-
000 pounds of pipe \$70 instead of \$100. In other words I
would have reduced my cost price by about .0005 cent per
pound. No great amount, to be sure, but I am satisfied that es-
timate I sent you of .006 cent for shop work, including the riv-
eting, up to the time of calking is to be done, is ample with the
proper equipped plant.

Yours truly,
SAN FRANCISCO BRIDGE CO.
By Geo. W. Catt.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

729]

Complainant's Exhibit 34.

San Francisco Bridge Company, Engineers and Contractors,
World Building, New York, N. Y. San Francisco and Seattle.

Portland Water Works Letter No. 16, Reference to 7 foot sheets as against 5 foot sheets.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco and Portland.

Dear Sir: If we get steel sheets 7 foot in width in preference to 5 foot sheets there will be a saving of 86,460 rivets and the driving of them, also the time saved in making 7,200 connections. So you see the manufacturing of 7 foot sheets are much preferable.

The above also saves the punching of 172,920 holes, and the swedging of 14,400 corners.

Yours truly,

SAN FRANCISCO BRIDGE CO.

By Geo. W. Catt.

[Endorsed]: Filed Feb 29, 1896. J. A. Sladen, Clerk.

McMullen v. Hoffman. Complainants' Ex. 34. G. A. B., Ex.

Complainant's Exhibit 35.

McMullen vs. Hoffman. Complts. Ex. 35. G. A. B., Ex.

730] San Francisco Bridge Company, Engineers and Contractors
World Building New York, N. Y. San Francisco and Seattle.

New York, Feb. 21st, 1893.

Portland Water Works Letter No. 17, Reference to Lukens & Co.'s price on steel plates, and Fuller Bros. & Co.'s price on rivets.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco & Portland.

Dear Sir: Up to the present hour the bid of Lukens & Co. on steel plates is the best we have received, which Hoffman already has, that is, \$1.85 per hundred pounds. This bid is based on narrow plates. They advise us that they would make plates 7 feet in width for additional of 50 cents per ton, or \$1.87½c per hundred pounds.

Julia E. Hoffman, Executrix, etc.

515

This only offered.

[We enclose herewith copy of letter from Fuller Bros. & Co., 139 Greenwich St., New York, reference to steel rivets, which is the best price we have up to date.]

Yours truly,

SAN FRANCISCO BRIDGE CO.,

By Geo. W. Catt.

Enclosure:

Copy of bid of Fuller Bros. & Co.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 36.

McMullen v. Hoffman, Compls. Ex. 36. G. A. B., Ex.

San Francisco Bridge Company, Engineers and Contractors.

[731] World Building, New York, N. Y., San Francisco and Seattle.

New York, Feb. 21st, 1893.

Portland Water Works Letter No. 19, Revised estimate of shop cost.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco & Portland.

Dear Sir: Total men to operate tools, to deliver the pipe for calking, 60 men, at an average of \$2.50 per day \$150.00
 Coal and oil 25.00
 Rivets for 50,000 pounds of plates; excess of cost of rivets over price paid for the finished pipe 60.00
 Engineer and fireman ... 15.00
 Shop superintendents and supplies 50.00

Making a total per day of \$300.00

Assuming that we turn out 50,000 pounds per day, we have the shop cost of pipe ready for calking.

as per previous letter006
 Calking estimated at0005
 Dipping and Testing estimated at0015
 Contribution towards cost of above plant003
 Superintendence and Incidentals0015

Making a total of0125

Summary will be as follows:

Riveting in field (rivets included in shop cost) . . . . .	.002
Hauling . . . . .	.0025
732] Shop as above . . . . .	.0125
Profit . . . . .	.007

Or bid for pipe in the ditch024

This is best I can give to-day.

Yours truly,

SAN FRANCISCO BRIDGE CO.,

By Geo. W. Catt.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 37.

McMullen v. Hoffman, Complt. Ex. 37. G. A. B., Ex.
San Francisco Bridge Company, Engineers and Contractors,
World Building, New York, N. Y. San Francisco and Seattle.

New York, Feb. 21st, 1893.

Portland Water Works Letter No. 23. Reference to tools.
J. McMullen, Prest., San Francisco Bridge Co., San Francisco
and Portland.

Dear Sir: Best I have reference to tools up to the present date is on basis of patronizing Hills & Jones reference to punches, planers and rolls; Bement, Miles & Co., for riveters, on basis of furnishing one set of tools. complete, for one side of the shop in 60 days, for shipment from here.

733] Enclosed I hand you photograph of Bement, Miles & Co.'s tools. You already have Hills & Jones' catalogue.

Also enclose blue print showing general arrangement of one riveter.

Yours truly,

SAN FRANCISCO BRIDGE CO.,

By Geo. W. Catt.

Dictated.

Enclosed to Portland: Photograph and blue print of machines.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Complainant's Exhibit 38.

McMullen v. Hoffman, Compts. Ex. 38, p. 1. G. A. B., Ex.
 San Francisco Bridge Company, Engineers and Contractors.
 World Building, New York, N. Y. San Francisco and Seattle

New York, Feb. 22nd, 1893.

Portland Water Works Letter No. 27, and last before letting.
 Reference to speed of tools.

J. McMullen, Prest., San Francisco Bridge Co., San Francisco and Portland.

[734] Dear Sir: In figuring speed at which work can be turned out, the actual time actually occupied by the tool is inconsiderable. Take the punches, for instance, after the plate is set there is no trouble to get 12 to 15 strokes per minute. In rivets, there is no trouble to rivet 7 to 10 rivets per minute after the material is in place once. The time is occupied at the punches, for instance, in getting the plate on the table, fastened in, loosened, turning it over, and fastened again for the other side, then loosened, and getting it on the crane ready for the next punch or planer, as the case may be.

We are now figuring on using punches of the Hills & Jones type. Punches for punching the transverse single row of holes, we contemplate using No. 5, on page 16 of their catalogue, 15 in. throat machine. This punch so arranged and constructed as to carry 6 punches, and die holders for the same. Punch to be without engine, and arranged to run with right angle gear from main driving shaft; the radial double row of holes we are contemplating doing with No. 6 on page 14 of their catalogue, 16 in. throat machine. Punch constructed and arranged to carry 10 punches, die holders, etc. for the same.

Portland Water Works Letter No. 27, page 2.

Auxiliary punch and shear we are contemplating using No. 3 machine, on page 21 of their catalogue, 30 in. throat, to use for doing the odd work, such as punching manholes, etc., the odd shape sheets for making bends, etc. This punch also arranged as a shear.

Spacing tables to be furnished for these as per cut on page 149.

Planers, as per page 147, size No. 2, 16 feet.

[735] Rolls as per page 127 of catalogue, size No. 3, 8 feet, 2 in. between housings.

John McMullen vs.

The riveting plant, we are not fully decided yet, as we have not as yet final proposition from Morgan people or Sellers & Co. We only have definite proposition from Bement, Miles & Co.

Yours truly,
SAN FRANCISCO BRIDGE CO.,
By Geo. W. Catt.

Cold as Hell? here. No prospect of starting Boston now for 10 days anyway.

McMullen v. Hoffman, Complts. Ex. 38, p. 2. G. A. B. Ex.

[Endorsed]: Filed Feb. 29, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "A".

McMullen v. Hoffman. Deft. Ex. A. G. A. B., Ex.
San Francisco Bridge Company. Railroad & General Contractors, Dredging & Excavation. Offices, 42 Market St., San Francisco, Cal. Occidental Block, Seattle, Wash.

San Francisco, Cal. December 31st, 1892.

Mr. Lee Hoffman, No. 53 Worcester Block, Portland, Oregon.

Dear Sir: The Risdon Iron and Locomotive Works sent for [36] me yesterday, and told me that if I had any pull, or had any friend in Portland who had a pull, to get in and use it with the Portland Water commission, as the Oregon Iron and Steel Company were trying to get the commissioners to adopt cast iron pipe for the Bull Run pipe line, claiming that they have a mine in Mexico from which they get very superior ore and that they could make cast iron pipe that would stand a tensile strain of 24,000 lbs. to the square inch; while the best pipe makers in the east claim 16,000 or 17,000 pounds to the square inch is the most that cast iron will stand.

If the Oregon Iron and Steel Company can prevail on the commission to adopt cast iron, it would virtually create a monopoly for them, as they are the only ones there who make cast iron pipe, and the Risdon people tell me that they can make it there in Oregon cheaper than one can import it from the east.

As you are acquainted with all the Water Commissioners, and have social and business relations with many of them, I think you are in position to counteract this movement, and if

Julia E. Hoffman, Executrix, etc.

we are to make anything ultimately out of this job it will be necessary to knock out this scheme. Get in and do what you can to beat it.

I understand the Oregon Iron and Steel Company have a big pull in the commission. What you do, must be done at once, as I understand they are to determine the matter at a meeting to be held next Tuesday.

Drop me a line and let me know how matters stand there on this question.

[737] I was sorry to hear that you sustained quite a heavy loss during the recent bad storms. We, too, met with quite a loss in the Folsom bridge; it was carried out about five days before it would have been off the falsework; will probably cost us 7 or 8 thousand dollars to get it back.

How are things generally with you?

Yours truly,

J. McMULLEN.

Received 1-2-93.

Answered 1-2-93, by L. H.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "B."

McMullen v. Hoffman. Deft. Ex. B. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., Jany. 26th, 1893.

Mr. Lee Hoffman, Room 53 Worcester Blk., Portland, Oregon.

Dear Sir: Yours of January 23rd at hand and noted.

[738] I have a clipping from the "Oregonian" of the 21st inst., which sets forth the intention of the water committee substantially the same as indicated in your letter, namely, cast-iron pipe from Mt. Tabor to the city, the rest wrought iron pipe, and that they are going to receive bids on cast-iron pipe for the rest of the way also. We suppose that asking for bids for cast-iron pipe all of the way was a kind of a concession to the O. I. & S. Co. I understand from this clipping that separate bids for the wrought iron for the pipe will be taken.

From correspondence that I have seen between the Risdon and Wolff & Zweicker, I am satisfied that they are pretty intimate, and that they will pull together in some form. Now, I

do not think that they will take us in, unless we convince them that we are going to make a hard bid for the work. Do not let them know that you do not want the job! I do not think that the Risdon want so many partners in the contract. They might take Wolff & Zweicker in, but I do not think that they would want to take you and us in. I think that we would do better by making them buy us off. The Risdon is a large and wealthy 4-handed concern, and they will make a hard fight for this job. I think that we bid so hard on the job before, that if they think we are going after it on the same lines again, that they will be disposed to capitulate with us. I think you ought to make Wolff & Zweicker understand that you and I are together, and that we are going to hit the job hard; then if they make satisfactory inducements when the time comes we will quit. I am pretty close to the Risdon. Have been in several deals with them. We were in with them on the contract for furnishing the dredger and doing the dredging at Honolulu—about \$15,000,000 worth of work; they took me in because they could not very well get along without me; we had a half interest in the deal. If they think they can throw you and me overboard they will do it in a minute, so I do not think we ought to talk partnership at all; on the contrary, talk "get the job," then if they are afraid of us they will buy us off. Of course, there may be so many bidding on it that it would not be worth while buying off one unless they were going to buy them all off, but this will develop later.

Perhaps the O. I. & S. Company could be gotten out of the way by giving them the cast-iron work, as I do not think the Risdon could compete with them on that portion of the work; yet the O. I. & S. Company might get a better price for that portion of the work if the Risdon and us should agree to let them alone on it, on the condition that they let the wrought iron part of it alone.

How much money will the committee have to spend?

When do you now expect to be in the city?

Send me copy of the specifications, and full information, as soon as the same is out.

We will have to get some one to do some rustling for us in the east for material, plant, etc., etc. Perhaps Mr. Catt can get time to do this.

Is the Wolf & Zwicker concern a strong outfit financially?

Julia E. Hoffman, Executrix, etc.

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We might be able to get a portion of the work instead of a pool—the submerged pipe, and the bridges, or a subcontract for laying the pipe.

I think that we can arrange it in some way so that we can make some money out of it.

I assure you that there is absolutely nothing offering in the bridge business in California. The bridges that went out in this state did not amount to a "hill of beans"—small, cheap, wooden structures; I do not know of a job that has been let to be re-placed; neither do I know of one advertised.

Mr. John Dyer, one of Risdon's men, is now in Portland looking after this job. Meet him and let him know that you are after the job.

Yours truly,

J. McMULLEN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "C."

McMullen v. Hoffman. Deft. Ex. C. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., Feb'y 6th, 1893

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Please send us strain sheets and blue prints of the plans of the bridges, including profile; also blue prints of the ball joints, and any other plans for the pipe line that they may have.

I have sent three copies of the specifications to Mr. Catt, and instructed him to get cost of plant for manufacturing pipe, and also the cost of manufacturing pipe, together with the cost of lap welded pipe for the submerged portion; also cost of ball joints.

I will probably be up there about the 25th of the month, at which time I will have a report from Mr. Catt on these things.

[741] I also have the old estimate, very full and complete, that we made five or six years ago—when the work was offered before.

As I said before, I think the important thing is to make Wolff & Zwicker think that we are going to hit the job hard; then they will tell the Risdon, then we will see what we can do when we get there.

You said that they would not have steel. Specifications provides for bids on steel as well as on iron. How is this?

Also please send to Mr. Catt, room 183, World Building, New York City, copies of all the blue prints mentioned, or that they may have illustrating the work.

Yours truly,
J. McMULLEN.

Received 2-8-93.

Answered 2-8-93.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "D."

McMullen v. Hoffman, Deft. Ex. D. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., Feb'y 8th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

742] Dear Sir: We have schemed and figured a great deal the last three or four days on the Bull Run pipe line, and we are getting enamored of the job, and I think the way to make some money on that proposition is to do the work. There is nothing in furnishing the iron, as undoubtedly the iron men will bid direct, as per specifications, and I suppose we will have to give the Oregon Iron & Steel Co. the cast-iron.

We understand it is settled that the cast-iron pipe will be built from Mt. Tabor to the city reservoir—5½ miles—and that the other 24 miles, from the head gate to Tabor, will be of wrought-iron pipe—write me if this is correct—although they take bids on cast-iron, too, for that latter. I figured it up roughly, and I think that cast-iron pipe on this latter would cost about \$400,000.00 more than wrought iron, and that on the other piece from Mt. Tabor to the city reservoir in cast-iron will cost about \$100,000.00 more than it would if they did it in wrought iron, and as it is no better I think this is quite a gift that the water committee will be making to the Oregon Iron & Steel Company.

We will have to make the Oregon Iron & Steel Company know, when the time comes, that if they do not quit, and let go on everything except the cast-iron, that we will hit them hard on the cast-iron and make it rocky for them, as I understand from interview with eastern cast-iron pipe men, who have agents here, that they can put that cast-iron down in Portland cheaper than Portland men can make it, and bet-

[743] ter too. I shall have some figures from the McNeal Pipe Foundry, one of the largest pipe manufactures in America; their representative was in the other day. I have made very full inquiries in the east, and Mr. Catt is going to devote his entire time next week to getting prices on cast and wrought iron pipe and the cost of plant and equipment for doing the work, and other matters relative to the job.

I want you to make very full and thorough investigation, too, and then we will compare notes.

I do not think it will take much money to run that job; think perhaps the plant, including building, is worth somewhere from \$25,000.00 to \$40,000.00, but this is practically all the investment that we would need to have, as they are to pay 90 per cent every month, and that ought to pay all bills; only thing would be to see that the estimates were kept full. which I do not think would be any trouble in doing with old man Smith. I think you ought to ascertain (off hand, and without apparently caring to know) just what the Oregon Iron & Steel Company do want in the job, and whether they will be satisfied with the cast-iron or not, and how far you think the committee will go to favor them. If the wrong man should be the low bidder, do you think they would readvertise the job over again to knock him out? I expect you to know all about this very important part of the business when I get up there.

Yours truly,

J. McMULLEN.

Received 2-10-93.

Answered 2-11-93.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[744]

Defendant's Exhibit "E."

McMullen v. Hoffman. Deft. Ex. E. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., Feb'y 13th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Yours of Feb'y 11th at hand and noted.

From your letter I understand that you expect that the Oregon Iron & Steel Company will only bid on cast iron from Mt. Tabor to the head-gate. Is this correct? That is, they do not intend to bid on wrought iron pipe. Now, if this is correct,

they cannot possibly get down to the wrought iron price, and consequently will not be in the business for this portion of the work.

The cast iron can be put down from the east, by sailing vessel freight, for about \$30.00 per ton. I do not think the Oregon Iron & Steel Company can make it with any profit at this price.

Mr. B. A. Knight, Agent McNeal Pipe & Foundry Company here, tells me that he thinks that the specifications have been written in the interest of the Oregon Iron & Steel Company in designating unusual and different sizes from what the pipe foundry men in the east make. Many years since the pipe foundries got together and organized a standard, and everybody conformed their product to that standard of sizes, and he seems to think that these specifications have deviated from those sizes to make it necessary to put in a different plant and fixtures to do this job, which he says no pipe foundry would do.

[5] We quote the following from a memo. which he sent me on this subject: "Are the sizes given for cast-iron pipe 32 in., 33 in., 35 in. and 42 in. correct, and if so does it mean internal or external diam. In either case they have chosen sizes that no foundry in the country have ever made; they have no fixtures for such odd sizes, the standard of all foundries run 30 in., 36 in. and 40 in. or 48 in. No foundry can make these odd sizes pipe without going to a great expense in preparing for it, which would necessarily add to cost of pipe, while several of the largest foundries are already prepared to make 30 in., 36 in., 40 in. and 48 in., internal diam. As there are several errors in the spec., the printing of these sizes may be another; for instance, cast-iron pipe E. it says "12 inch length" instead of 12 ft. They ask for 24 in. ball and socket joint pipe in 13 ft. lengths—this should be 12 ft, lengths same as other sizes. There is not a foundry in the country that can deliver at Portland any quantity of pipe called for of these sizes in 80 days after receiving contract."

I wish you would call Col. Smith's attention to these sizes not conforming to the eastern pipe foundries standards, and also ascertain whether it means inside or outside diameters, and draw him out, and then write me and let me know if you think he has willfully made the specifications to accommodate the Oregon Iron & Steel Company. Do not mention the Mc-

[746] Neal Pipe Foundry to him, as Mr. Wright particularly requested me not to implicate him in the inquiry, as he expects to be there when the letting comes up. He says he has twice bid on different lots of cast-iron pipe for the water committee and each time was the lowest bidder and that the bids were all thrown out, and that it was brought in open market from the Oregon Iron & Steel Company at a higher figure; he thinks that the committee are thoroughly in harmony with the O. I. & S. Co. so far as the cast-iron pipe is concerned, and that they do not want any competition on that part of it. What do you think? Write me on this matter as soon as you have made this investigation, as I have promised Mr. Knight that I would find out how the engineer and committee stood on this question, and whether the odd diameters were made intentionally and for that purpose, and whether it is inside or outside dimension.

Yours truly,

J. McMULLEN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "F."

McMullen v. Hoffman. Defts. Ex. F. G. A. B. 22x.

San Francisco Bridge Company.

San Francisco, Cal., March 8th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

[747] Dear Sir: Got home all right, and this afternoon have had an interview with Bob and the Captain, but can settle nothing with them yet as their eastern man has not arrived as yet; they expect him about Sunday; they told me that he had given them a price prepaid to Portland, also a price at the mill, and that if they could save anything on his price delivered on the freight they might accept his mill price, and make their own arrangement for freight. They have had a talk with the Union Pacific people to see what they could do, but as yet they cannot say anything about the routing of it. I told them that it would be some advantage to us to be able to control the delivery of the plates, so that they would arrive just when we wanted them, and not too many at a time, etc., etc., and with this in view we were prepared to make them an offer to assign their contract.

The Captain did not act as if he was unfavorable to this kind of a proposition; said he would have to wait until his man got here—when I am to see them again; he promised me that he would give the Union Pacific the preference. I told him that if they handled it, it could be sidetracked at Fairview without additional cost, and that that was another reason why we wanted to get control of the proposition. I know that they will do all that they can to oblige us, but whether they will sell out to us at a price that would be satisfactory. I am doubtful. I would not be in favor of giving them over \$15,000 anyway, but when we get down to that point I will advise you by wire as to what the situation is.

748] I wish you would send me a blue print profile and plan of pipe line location, as I have none here. Also wish you would get me a regular railroad profile of the route of the pipe line. The Colonel must have these; I would like to have a copy; you should have one there, too, in the office.

After a conference with our Mr. Wood, I am satisfied that all our estimates on the plant to build the pipe were excessive.

I think we can put a plant there to do that work at a cost not to exceed \$35,000.00. However, if you consummate the deal with Wolff, we will not need to scheme on this point further. Yet I would not make another dollar concession to him. I think we are paying a liberal price, and that he can make a lot of money out of it, and I think you ought to close it with him without waiting to find out how the iron will be routed. If we can send it over the Union Pacific, we will do so; if we cannot, he will have to manage it otherwise; in any case it does not amount to over \$5,000.00 or \$6,000.00.

I wish you would see your friends on the committee, and see if you cannot get them to reconsider the submerged pipe proposition, as I believe that we have at least \$20,000.00 in that. If it is advertised again, it might be possible that we would get left; if we should, however, at the first bidding, do you not think we could get it readvertised again—so as to give us another chance at it? I think you have pull enough with the committee to do this. If you cannot get it awarded on the present bids, I am in favor of looking after it very closely when it does come up again, and be in touch with every one who makes inquiries about it relative to bidding, and taking them in, and getting a good price for it. If we can do this I believe

[749] it can be gotten the next time with more money in it than there is now—for the reason that the wrought iron pipe will be cheaper than the cast iron pipe. I hope you will keep a close watch on this, and advise me promptly, and if any Eastern men should go after it the second time, we can have Mr. Catt look after them and take them in, and you can look after any one up there, and I can look after any one down here. The Risdon would probably have to get a little something out of it.

Another thing I wish you would do is, ascertain what the bid of the Oregon Iron & Steel Company was for laying—which was erased in their bid; the clerk, or the Colonel can tell you this: you will remember that in reading the bid Mr. Failing remarked that the bid for laying was scratched out. I would like to know what it was.

Did the Pacific get the bridges?

Advise me how things are going on there.

Mr. Wood sends you by this mail a synopsis of bid from the Southern California Pipe Company for manufacturing and laying this pipe. They were going to do it with a \$7,500.00 plant, and by hand, and Mr. Wood tells me that without figuring the cost of the plant, and without figuring the cost of the asphalt, their bid is 1 4-10 cents for manufacturing, or just what we propose to give Wolff. I suppose the asphalt and the plant would probably amount to about \$8,000.00 or \$9,000.00. I have considerable respect for these parties' figures and calculations, because they are practical men and have built many miles of pipe.

Yours truly,

J. McMULLEN.

[750] [Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "C."

McMullen vs. Hoffman, Deft. Ex. G. G. A. B., Ex.

San Francisco Bridge Company,

San Francisco, Cal., March 14th, 1893.

Mr. Lee Hoffman, Portland, Oregon.

Dear Sir: I just came from the Risdon. Met Wolff there, also J. W. Hoffman, of J. W. Hoffman & Co. of Philadelphia—the party furnishing the plates to the Risdon. I inclose you his card. They are just closing the contract with him. The routing of the stuff has not been determined on as yet. In fact,

from what I heard them, say, I think they are going to stand the railroads off one against the other, and make them pack it for the lowest living rate possible. I told them that you would prefer to have it come over the Union Pacific, if possible. Wolff says he does not care much.

Wolff has closed with the Risdon for a plant to do the work, punches and riveters and accumulator and the use of the calking tool.

I think Zwicker returns to Portland to-night.

Wolff said he might possibly go east.

Wolff says he will be delivering us pipe by the 15th of June. I doubt this, however.

[51] I told Wolff that I thought that he had a good contract; that he would pay for his plant, and make \$25,000.00 besides. He said that he thought he had a good contract and that he would do well; said he thought that we, too, had an excellent contract.

Now, Lee, that we have gotten rid of furnishing the plant, and rid of the organization and administration of a pipe shop, and got it reduced to a plain proposition of digging the ditch and laying and riveting the pipe, it will not require much money now to handle the job, perhaps you would like to buy me out, as the conditions that originally led us to go in together, namely, the large investment and administration involved, are now overcome, and you could handle this thing just as well without me as with me. You readily understand that it is a much simpler proposition now than it was when we first agreed to go together. Of course, I only make this as a suggestion. If you do not think favorably of it, and prefer to let it remain just as it is, we are agreeable, and will try and contribute our share to make the venture a success—which I feel sure it will be.

Neither do I want you to think that we are doubtful about its being a profitable job; on the contrary, every way that we are able to look at it, or figure it, we cannot see how we can help but pretty near work to our estimate. I believe our estimate is as near right as it is possible to make it. In fact, it is a concurrence of three or four estimates: Mr. Catt's, our own, your own, and Wolff's. We cannot all be wrong. While it is possible that the pipe may cost ten, fifteen, or even twenty thousand dollars more to lay and rivet it in the ditch than we

[752] have estimated, I think this would be the extent of any excess or overrunning of the estimate, and I think by close and judicious management of the other parts of the work, the excavation, and the specials, and advantage of changes that may be required will more than make up what the making and laying of the pipe may overrun the estimate. In other words, I have faith in working to our figures.

If you buy me out, it will include my interest in the subsequent work, and I will do my best to get you the submerged pipe.

The only thing that would induce me to sell out to you is that we are short of money, owing to the large investments that we have recently made in the east. My price is \$25,000.00; half cash, balance in negotiable papers—6, 12, and 18 months. Let me hear from you on this subject.

From the talk I had with the Risdon, I feel sure that we will not be able to buy them out; they think that they have given the bond, and that they will be responsible to the water committee any way, and that they will be responsible for the pay for the iron; and then they have a little pride in it, I think, and would not want to be known selling out. I am satisfied that we cannot do anything with them that would be satisfactory to us.

Yours truly,

J. McMullen.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "H."

[753] McMullen vs. Hoffman. Deft. Ex. H. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., March 20th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: I have read over carefully the contracts that you sent me, and I wish to mention a few things that occurs to my mind:

Firstly: Relative to the bends. It seems to me that the economical way to construct these will be to determine from survey in the field the actual degree of curvature required at each bend, then make all these bends in the shop, and only have one joint to make in the field. I do not see why this cannot be done, and why it is not the most economical way to do

it. I shall see Moore of the Risdon and get his advice about this. I understood Dyer to say that they always made them in the field. Dyer also told me that Schussler never permitted but one strap or bend to be put in a place; that where they required more than one he always had a section of pipe, at least 5 feet long, or one sheet intervening between the short strap or bend. I am sure it will be much cheaper to have all these bends, if possible, made in the shop, and I do not see why they cannot all be made in the shop, as it is no trick to get with an instrument the actual degree of curvature required at each locality. If we have them made in the shop we might get them [754] in with Wolff's contract without extra compensation to him. Don't you think so?

Page 12, paragraph 81, says that "bends must be connected with adjacent pipes by collars and rods, and braced to the outside with dry masonry or concrete whenever it may be ordered by the engineer of the water committee. What is the Colonel's idea about these collars and rods, and about when they will be necessary?

Wolff told me that he intended to use iron rivets. The specifications call for steel rivets. I suppose the Colonel has been conferred with, and agrees to iron rivets.

Also on page 8, article 61, provides "that the rivet holes must be punched from the side of the plate which is to be placed in contact with another." I understand that the Risdon's plan does not punch this way. I suppose, however, that Wolff has arranged for plant that will do this, or has arranged with the Colonel that it is not necessary to be done this way. However, I thought I would mention it to you.

I have just heard that Kelso has taken a big sub-contract from McMertrie & Stone on the Southern Pacific work, near Santa Margarita—a year's work, two or three hundred thousand dollars' worth, and has just gone north to get his stock to put on this work. I am sure that he will try to get Foy for this work. Last summer, when we had nothing for Foy to do, we loaned him to Kelso, or at least told him that he might take a job with Kelso if he wanted to until we needed him. Now, if we want him on the pipe line, I want to telegraph Lockwood [755] to this effect at once, as he might not think we had anything for him to do, and might make an arrangement with Kelso. If you have not written me already about this, please tele-

Julia E. Hoffman, Executrix, etc.

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graph me on receipt of this letter if you want him, and I will communicate with Lockwood. There is just one thing about Foy—when he is on a job you do not need to be on it yourself; at least, he comes nearer being this kind of a man than any man that we have ever had.

Yours truly,

J. McMULLEN.

P. S.—There is nothing in the specifications that says whether the pipe is to be weighed before it is dipped or after, and it will make a difference of several thousand dollars. If the Colonel will stand it you ought to arrange to weigh it after it is dipped. Perhaps you and Wolff can get him to agree to this, as Wolff is interested in it as much if not more than we are.

Received March 23, 1893.

Answered March 23, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "I."

McMullen vs. Hoffman. Deft. Ex. I. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., March 18th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Yours of the 16th at hand and noted.

[756] I note what you say about not buying me out. This is entirely satisfactory to me, and I agree with you that the contract is all right; that I will make more money out of it by not selling out.

I think Wolff is going home to-night; have seen him nearly every day since he has been in town. They have closed with the Risdon for an outfit for building the pipe; trade also includes the pneumatic caulking tool. Bob Moore told me that the entire deal was about \$28,000.00. I do not know exactly what it includes, but understand it has 8 riveters, 2 punches, and that they are going to build the rolls in Portland—or use some that they have.

I had lunch with the Captain and Moore yesterday, and the Captain says that the iron will be there on time, according to their contract with the water committee, namely, sixty days from the signing of the contract, which was the 8th of March;

this would make the first consignment due there the 8th of May.

Wolff hopes to be ready to commence work about that time, though I apprehend that he will not get any pipe to lay before the 1st of June. I think we should be ready by that time to lay the pipe.

We have schemed several times on machinery to dig a small ditch, and have always come to the conclusion that it would not pay to attempt to get anything up for this purpose. The principal reason is this, Lee, that the section of ditch is too small, that it would involve too much moving of the machine—so much that excavation by machinery would not be economical. I am entirely satisfied on this point. You see, we have about 24 miles to go to get less than 300,000 yards. In other [757] words, it only amounts to about 11,000 yards to the mile. Well, now, take 11,000—say it costs us 15 cents a yard to throw it out by hand, that is, only \$1,650.00 a mile. Now, I do not think you could build a machine that you could move over the ground and do the work for this price. The whole amount to be dug is so small that it would not justify investment in a machine. For instance, the whole amount at 11,000 yards to the mile, and say 15 cents per yard, only amounts to about \$38,000.00. Now, I do not apprehend that you could get up anything of a machine at all for less than from \$5,000.00 to \$8,000.00. Then, again, there is so much uphill and downhill to it; liable to encounter loose boulders and stone, which would be fatal to the successful operation of a machine. Now, I am quite satisfied that the old way of plowing and throwing it out by hand is the cheapest way to do this work.

We have considered this same proposition many times before, and have always come to the same conclusion, even where the conditions were more favorable to machine work than they are on this job.

With regard to sub-letting this part of the work, I am not decided whether it is to our interest so to do or not, and am doubtful about the propriety of doing so for the following reasons:

1st. It is so hard to get a sub-contractor who amounts to anything.

2nd. It would be so hard to get a sub-contractor to do the work at the time, and in the manner that would serve our interests.

758] 3rd. We have got to have camps, commissary and administration all along the line for the putting into the ditch and riveting of the pipe, and I do not think that this commissary or administration would cost us hardly any more to superintend the excavation and refilling at the same time, and then we would have the advantage of having it done exactly as we want it, and our commissaries would be more profitable, because we would have a larger number of men to board, while the administration of it would not amount to much more; for instance, we have got to have timekeepers and superintendents, etc., etc., and they can just as well administer the whole work, and the riveting of the pipe would not have to stand all this cost of administration; it would be shared by the excavation.

The plant, outside of some stock to do some of the excavation, does not amount to anything; should not suppose it would amount to more than \$1,000.00 or \$1,500.00 on the whole job. We need some good stock to plow with; perhaps—for a guess—from 10 to 16 head; possibly less. Kelso has a lot of fine stock, and I did not know but we might make some arrangement to hire them from him cheaply for a couple of seasons, as I do not think he has anything for his stock to do.

We, too, have 7 or 8 head of horses and mules at Seattle that we had on the Great Northern, that we could turn in on the work—if you were agreeable. Besides, we have quite an outfit of plows, wagons and scrapers, and other excavating plant, together with a lot of camp fixtures, blacksmith outfits, drill steel—all of which are exactly adapted to the work, and we 759] would put it all in at a price that will be entirely satisfactory to you, and it will not cost much to ship it over from Seattle.

I have another letter from Mr. Catt, and he is satisfied that there is money in the rock and earth work.

I have submitted you my ideas candidly on this subject of excavation, and I am satisfied that it will be to our interest to keep the thing right in our own hands.

Since writing the above, Mr. Wolff and his son came in, and I told him that I was writing you relative to sub-letting the

excavation, and he volunteered to say that he thought we would make a mistake so to do; says that we ought to have control of this even if we do not make a cent out of it.

I got your wire about having the 35 in. iron come first. This is all O. K. and has been fixed.

I think we ought to begin to get our organization together and start to dig the ditch about the 1st of May. If we do the excavation ourselves, I think this is a big enough job to have a superintendent of Foy's calibre, and I think you would be satisfied with his management. I think we need a general superintendent to have charge of the whole business—to see that the pipe is properly delivered, and to superintend the excavation and refilling, and to look after the camps and boarding-houses, and be at the head of the gangs who are riveting and connecting the pipe. Mr. Foy is a rustler, and he will stand no nonsense, and he has a faculty of getting along with men, and he knows a good man when he finds one, and he has a pretty good following of men, too. However, if you have a superintendent or somebody whom you would rather have, I am satisfied.

[760] I have had some talk with Risdon relative to fitting us out with tools for field use, and I will send you, as soon as I get it, an inventory of what they think we ought to have.

I also expect to be able to get on track of some good and experienced men for connecting and riveting pipe through the Risdon.

I would like to know about Foy as soon as possible, as I would like to advise him if we want him, and when we would want him.

Also think you ought to settle as soon as possible about the purchase of the specials and fittings, so as to have them on hand in time. Presume we will need some of them by July. After you have determined where you are going to lay pipe first, you can arrange with the Colonel as to what will be needed this year and only purchase what will be needed for this year—and that we will not have to pay this year for what will not be required until next year.

Yours truly,
J. McMULLEN.

Received March 20, 1893.

Answered March 21, 1893.

[Endorsed]: Filed Mar. 2, 1896.

J. A. Sladen, Clerk.

[761]

Defendant's Exhibit "J."

McMullen vs. Hoffman. Defts. Ex. J. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., March 24th, 1893.

Mr. Lee Hoffman, 53 Worcester Blk., Portland, Oregon.

Dear Sir: Your letter of the 21st inst. to hand.

I am very sorry that the committee engaged an objectionable engineer. Still I believe that we can get the Colonel to stand in with us on anything that is reasonable and overrule Clark.

I herewith enclose you copy of an extract from a letter I have just written Mr. Lockwood. After Lockwood has seen Foy, and reported to you, I wish you would let him know positively whether you want Foy or not. I am sure that Foy can get a job, but I think that he would a little rather work for us than for Kelso, as he would be nearer home. As you know, he bought Catt's old place in Seattle and has his family there.

Frank Smith, one of the principal pipemakers here, after the Risdon, whose bookkeeper lives in Alameda, near Mr. Krusi, and they are neighborly, says he is entirely satisfied that the Risdon and Wolff & Zwicker pooled on this last job; he said we would never have gotten the job at any such price as we did if they had not gone together. He says that the Risdon thought that Wolff was going to get the job anyway, and that there was no one else that would go low on the work—and, hence, they went in with him. When I think how the

[762] Captain acted before and after the bids were in, and how strongly he recommended us to sell out to Wolff—I am almost tempted to think that there is something in this. What do you think?

What do you think of Catt's idea of sub-letting the digging of the ditch? Do you not think you could let the digging of it by contract for 15 cents? I do not mean the filling of it, simply the digging! On the whole, I do not think we could make anything by sub-letting it—even if we could let it for less than we can dig it for; I still think that we ought to have full control of this part of the work, even if we do not make

anything on it, and I am quite sure that there is nothing in attempting to dig it with a machine.

Yours truly,

J. McMULLEN.

Received March 27, 1893.

Answered March 27, 1893.

[Endorsed]: Filed Mar. 2, 1896.

J. A. Sladen, Clerk.

Defendant's Exhibit "K."

McMullen vs. Hoffman. Defts. Ex. K. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., March 27th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: In re-reading the contract between you and Wolff & Zwicker I observe that there is no provision or mention made of their giving you a bond. I understood that they were to give you a bond in a proportionate amount to what you gave the water committee. Of course, I know they are responsible, and believe they will do the work, but, as a matter of business, I think it would have been as well to have had them furnish you a bond guaranteeing the completion of the work, and I understood you to say that they would—that there was a bond provided for. Has it been overlooked, or did you agree to waive it, or did they give it, although no mention of it was made in the contract?

Your letter of March 25th at hand and noted.

I think, too, that station men will be the cheapest way of digging that ditch, and if this should prove to be a success, we might arrange to have them do the refilling and tamping.

I understand from pipe men that it is very desirable to have the excavation put all on one side—the opposite side from which the pipe is delivered—so as to have a level place on which to roll the pipe and put it together, very materially cheapens the laying of it in the ditch, as against having to take it up over a spoil bank and down into the trench.

I will leave it with you to finally determine how we shall do this ditch, and whatever you do will be satisfactory to me. Personally, I would defer a good deal to Foy's judgment in the premises, as he has had a good deal of experience in these matters.

Julia E. Hoffman, Executrix, etc.

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[764] What I am saying now about letting the digging of the ditch to station men, don't want you to understand conflicts with what I said before about not sub-letting it, because I am much opposed now as I ever was to sub-letting the whole thing—the digging and refilling—to one party, as I do not believe we would get a satisfactory service in that way, and we would not have the same control over the work that we would have by letting 3, 4, or a half-dozen station men dig a mile or two miles apiece. I think we ought to make 5 cents a yard on the earth excavation, at least if we let it out say 15 cents for excavation and 10 cents for refilling.

Yours truly,
J. McMULLEN.

Received March 30, 1893.

Answered April 3, 1893.

[Endorsed]: Filed March 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "L."

McMullen vs. Hoffman. Defts. Ex. L. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., April 13th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: I have not written to you lately—have not answered your last letter, because I had not anything to say, as [765] I have not heard from Lockwood about Foy. I saw Kelso, and I inferred from what he said that he would have work on the Northern Pacific job for Foy until at least the 1st of June, and Foy is a conscientious man and would not leave Kelso until he got well through with the job.

Our Mr. Wood has had some conferences with the Risdon people relative to tools and equipment for laying the pipe, and also prices on specials.

We enclose you copy of a communication from the Risdon, and a list of the tools they purpose to furnish, which, in their judgment is what we will need.

You might get Wolff & Zwicker to give you a list and price on what they think we ought to have, and then I think you ought to give the contract to one or the other of them, as it will take 3 or 4 weeks to get the tools made and shipped on the ground, as I understand many of them are specials, ham-

mers, etc., are of special design and make, and cannot be gotten in stock.

I am glad to tell you that Mr. Dyer, of the Risdon Iron Works, is going to represent the Risdon people at Portland; expects to go there the 1st of next month, and to have an office and stay permanently, and will look after the proper delivery of the iron, and will also look after other business in that territory for them. I think it will be of great advantage to us to have the benefit of Dyer's judgment and experience—as he has been a superintendent or rustler in the field on 2 or 3 large jobs of pipe work that the Risdon have done, aggregating some 30 or 40 miles of substantially the same character of work as this job; two of these jobs were for the Spring Valley and one was at San Diego. Dyer knows the difficulties and delays encountered and methods pursued on these jobs, and has good ideas as to the kind of organization and superintendence that we will need. I think it will be worth our while to make it an object for him to take an interest in our work by giving him, say \$100.00 a month, or \$500.00 a season at least for the first season, to tell us what he knows, and to keep us straight so far as he can.

I have personally had several talks with Mr. Dyer about the method of operation, and the difficulties to be overcome. When he gets to Portland you can have interviews with him, and you will find that he has a good bit of experience, and can give us valuable hints. Dyer says that they tried a great many different ways of digging the ditch, and that their sub-contractors also tried many different ways, but that they had to come back to the old original way of plowing it, and throwing the material out by hand, and fill it in by hand, too. He said the first two plowings—they used spans of horses, and on the other plowings, near the bottom, they used horses tandem, and plowed about 1,000 feet at a time. The Risdon people tell me that it is very important to have the ditch dug just right; that is, straight and level—at least straight on one side against which the pipe will be laid. Todd, the Southern California pipe man, told us the same thing: that the accuracy with which the ditch was dug greatly facilitated the rapidity with which we could lay the pipe.

Mr. Dyer says that it will be necessary to cover the pipe at

it at 5 or 8 inches just as soon as it is coupled up in the ditch, and before the joints are finished, to keep it from contracting and expanding and tearing itself to pieces. The necessity for this quick work, he claims, precludes all possibility of using scrapers for back filling, but it seems to me that scrapers could be used at least to fill in the last foot or two after the joints are all completed, and to level off the ground as the work of refilling is completed.

Another matter that I wish to call your attention to early, and which I think we can fairly assume belongs to Wolff & Zwicker to do, as they contracted to deliver the pipe at the shop ready to lay in the ditch, is this: The cleaning of the asphaltum off the ends of the pipe, where they are slipped together, and the reaming out of the asphalt from the rivet holes in the ends of each section of pipe. Loyer says this is quite a job; estimates that it will cost \$10.00 per day to do this, which would amount to about \$3,000.00, or in that neighborhood, on the job; he says it often has to be done at night; that during the day, when the iron is hot, the material is too plastic, and that it is only brittle and susceptible of being scraped off when the temperature is cool. I think that we can fairly assume that Wolff & Zwicker are to do this; that it is their job, and take it as a matter of course that they will do it.

Now, Lee, I want to call your attention to the fact that we have got to get together quite a large organization to do this work. As I figure it—deducting out sub-contracts, and assuming that half the value of the specials is material and the other half labor, and deducting our estimated profit, we will have left about \$150,000.00 to expend in 10 months in labor, or \$15,000.00 a month, approximately \$600.00 a day. Now, assuming that the average wages of skilled and unskilled labor will be, say \$2.50 per day, we would employ 240 men a day. Now, to direct, superintend, and oversee efficiently this number of men, and look after a commissary for them, will require quite a staff of foremen, superintendents, timekeepers, engineers, etc. This, however, is probably a larger number of men than we will employ. As there will be 10 or 15 per cent for administration and incidentals, that would have to come off this estimate of money for labor. I think it is of the utmost importance to run a good, clean, orderly commissary. I think

we will have to have two or three regular stations, camps located a mile or three-quarters of a mile apart, so that we can cover a mile and a half or two miles of the pipe line without requiring the men to walk too far to get their meals. Dyer says that they had a great deal of trouble in this on the last Spring Valley water job—said the boilermakers would not eat at the same table or in the same camp with the laborers, and that they had to keep wagons to haul them to and from the work. I think both these things wrong, and that we should not tolerate them. I do not think that the work ought to be more than a half-mile from the camp. In this way 3 camps a mile apart would cover 3 miles, and they would only have a half a mile maximum distance to go; perhaps two camps covering 2 miles would be sufficient. I think we ought to have a first-class man to look after this commissary, and good assistants, and it ought to be run on lines so that we would make some money out of it, and should be well conducted, so that the men would be satisfied.

779] I quite agree with you not to start this job with any union boilermakers. I think this of greater importance than anything else; that is, to do the job with men that we can control, and who will not attempt to control us. As I understand it, a union boilermaker will not work on a job where there are non-union men employed at the same work. If the boilermakers adhere to this principle, I do not think we want a single union boilermaker on the job.

The Risdon figure that we will require about 12 gangs to do the work at the required speed; that is, to couple up and make the joints in the field—a gang to consist of 2 riveters or boiler-makers, as they designate them, 1 man in the pipe, who puts in the rivets and holds the heads of the rivets with a mandrel, and a boy to heat rivets; this is 4 in a gang, or a total of 48 men. Besides this, they figure on extra men to take the place of any one who might drop out, or who would go away, or be off for a day or two. They figure on 5 caulkers, 15 handlers—that is, those placing the pipe in the ditch—5 cleaners—cleaning the ends of the pipe, if not done before shipment—and 5 foremen, or a total of 80 men. Assuming that these men average as before—\$2.50 per day—would make an expense for putting the pipe in ditch and riveting \$200.00 a day, or \$5,000.00

770] a month—in 10 months, \$50,000.00, which would leave \$400.00 a day for riveting and refilling the ditch, which would amount to \$10,400.00 a month—10 months, \$104,000.00. Yet I apprehend that this is approximately a fair distribution of the relative cost of the excavating and of the pipe laying, namely, \$50,000.00 for the pipe laying, and \$100,000.00 for the excavation, and a total of \$15,000.00 (fifteen thousand dollars) a month—10 months, making \$150,000.00. This, of course, is only roughly approximate with a view to get an idea of the number and class of men that will be employed, and with a view to the proper administration of the work.

Besides a general superintendent, I think it will be necessary to have an engineer on the work all the time to look after the accuracy of the ditch and the grades, and the holes in excavations in the ditch at the joints to permit riveting. These holes, I understand, want to be located very accurately, and many other things will require to be looked after by an engineer, who has accurate ideas, and is comprehensive and quick to see and calculate and lay out work. Do you agree with me about this? If so, have you any one in view? If you think our Mr. Wood would be a suitable man for this position, I do not know but we could arrange to spare him for the summer, and let him go there and be on the work. He takes quite an interest in this contract, and thinks he could be of great service to us there—and I have no doubt of this. Let me know your mind in this matter as if he goes there he wants to know it as early as possible so that he may make his domestic arrangements accordingly.

It is getting on towards the time, and I think we ought to arrive at some definite idea as to how we will organize and arrange the work, and I will be pleased to get a letter from you at your earliest convenience—going over the whole subject.

[771] The Risdon still maintain that the best way to make the angles is in the field, and for this purpose they have on a wagon, which is drawn along the line, a little punch, shears, and rolls and with these tools the bends are made and fitted and riveted right on the ground. I had not thought that this was the best way to do it, but their experience ought to be more valuable and more reliable, and more practicable than any theory that

we might think favorably of. This portable punch, shears, and rolls, you will notice are included in their list. Dyer says that these items amount to about \$500.00.

Yours truly,

J. McMULLEN.

Received April 17, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "M."

McMullen v. Hoffman. Defts. Ex. M. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., April 18th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Yours of the 14th at hand and noted.

We were a little slow in getting the prices that you asked for from the Risdon, as we had to keep after them about once a day for ten days to get out of them the prices and information that we sent you with our last letter.

[772] We note what you say about rivets. As I understand it the principal thing about the rivets is to get the right quality. Are the ones you have bought of the same kind and make as those Wolff & Zwicker will use?

I think it will be fully a month before Wolff & Zwicker's machinery will be shipped from the Risdon, so they could not possibly get it set up and ready to work before the 1st of June.

I note what Lockwood says about Foy. You seem to want me to decide as to whether we put Foy on the work or not. Now, I do not want to do this, Lee. I have told you just what I think about Foy and you see what Lockwood says of him, and I want you to determine whether you want to put him on the work or not; if you do, and write me to that effect, I will write Foy personally, and tell him that we want him, and when we want him, and I think he will come, but he will not come without we make him know that we really want him, as he is a man that is in demand, but I think he will come for me, if I tell him we want him; I suppose you would want him about the 1st of June. If you think you can do better I am perfectly willing you should not engage him, as you are to be the executive man on the job you are the man to decide and select your men. If I were the executive man, going to run the

job, I would put Foy on it in preference to any one I know, as I believe him competent to take charge of the whole proposition, and I think you want some one in charge over everything (including the commissary) and general manager or superintendent, who will be on the work all the time. We would probably want him a year and a half. His wages would amount to about \$4,500.00, which would not be a very considerable sum, in view of the fact that he would have the administration of in the neighborhood of \$150,000.00 of labor. Of course, Foy knows nothing about the technic of laying pipe. To do this rapidly and economically I think we will be largely dependent upon getting some good foremen and men in each gang, for moderate wages, to do this expeditiously, thoroughly, and rapidly—and it is to be boss or superintendent over all these that I recommend Foy, as he has had experience on large jobs, and over large gangs of men, and knows how to manage them. I think you would find Foy a great help to you on this work. I have no doubt, however, but that you can get good men for \$150.00 a month to act in this capacity. Assuming it will take a year and a half, this would make a saving of \$1,800.00 or \$2,000.00. Now, it is a question whether this would really be a saving or not. As I have indicated to you, my preference would be in favor of Foy.

We built about 3 miles of trestle work to carry pipe for the Spring Valley Co., some \$70,000.00 worth of work. This was on a job where the Risdon made and laid the pipe, and Bob Moore was always telling me what a rustler and good man Foy was; they saw a great deal of him on that job. Foy also ran the seawall job for us here in San Francisco; was on it about a year, and the last job he was on for us was on the Great Northern Railroad work, about \$300,000.00 worth of work, on which he had exclusive charge—hired and discharged everybody, bought his supplies, looked after transportation, ran the store, looked after the commissary and subcontractors; in fact, he had too much to do on this job; did not have enough good assistants, but I am satisfied that on this [774] work he did as well as any one could have done under the circumstances. If you write me to engage him, I will do so if I can, and I think I can. On the other hand, if you have some one else in mind, and think it is too

much money to pay, I shall be entirely satisfied with your decision in the premises. So, too, about my suggestion of putting Mr. Wood on the work. If you have some one else in view, or if you can spare Mr. Bush, and think he is fitted for that position, I am agreeable, but I think we will need some one in the capacity designated under Foy. In fact, it would be quite an inconvenience for us to spare Mr. Wood for this work, as we would not have any one to look after our bridge designing and estimating, except Mr. Krusi down here, and Lockwood and Cooper up there, and Krusi is mainly on the road.

Also want to hear from you on the other subjects considered in my last letter.

I remain,

Yours truly,

J. McMULLEN.

Received April 20, 1893.

Answered April 20, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

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Defendant's Exhibit "N."

McMullen vs. Hoffman. Defts. Ex. N. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., April 22nd, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Your letter at hand and noted.

I do not care how quickly you fire Risdon, or any proposition they make. I did not intend in any way to recommend the price that they made on specials or fittings, as I did not know the first thing about the real value of this class of things. I thought the bid they made for the outfit to lay pipe with was reasonable, but, of course, the Risdon are just like you or I—if you had an opportunity you would get a good price for your work; in other words, do one up—if they did not know it.

I agree with you that the bridge men are better than boiler-makers to do the riveting, and have no doubt that they can be trained so as to do caulking, too. We have no iron bridge men around us, but have no doubt we can get together quite a number on this coast. I think also that we can get a lot of cheap

[776] pipe men from Southern Cal., where they have been doing a great deal of this work; am going to confer with Todd relative to this. It may be necessary to get bridge riveters, some half dozen, say, from the east; if we get one or two from two or three different shops, each of these would know a dozen others that they could write to, and in this way we might be able to get an efficient force together. As you know wages are about 33 1-3 per cent lower in the east than here. Let me know if you do not think it would be worth while to have our Mr. Catt, or some one from our New York office, go to the Edge Moor people, and two or three other large bridge shops, and get them to give us one or two good men—with view that these men would have connection, and bring others. Of course, before we did this we would want to determine what wages we are willing to pay for this class of men; or, perhaps, it would be better to determine what they could get in the east, and then give them a little more as an inducement to come here.

You cannot find anybody who has less use for boilermakers, or trades' union people, than I have.

To answer your question direct—I do not know how many such men we could find here, but think we could probably pick up 10 or 12 by conferring with the different foremen, and getting them to recommend us men for this work. I am quite sure, however, that you will have no trouble in getting men enough when people know that the work has begun; of course, it is important to get a good gang at first; not to lose a month or two in getting to running at full blast—as the time is short. I think very favorably of getting a few good men from the east—even if we have to pay their fare out here, and give them pretty good wages—that they might draw others after them. However, we will do just as you direct in this matter.

[777] I have this day written Foy, offering him the job and asked him to be ready at the 1st of June; will advise you as soon as I hear from him.

I remain

Yours truly,

J. McMULLEN.

Received April 26, 1893.

Answered.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "O."

McMullen v. Hoffman, Defts. Ex. O. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., May 12th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: I inclose you copy of letter from Foy, and of my answer to same. This settles the matter as I understand it.

Two or three foremen have made application for a job; some of these men were recommended by Moore of the Risdon, and some by Schussler of the Spring Valley Water Co., and some by both. We have kept their names and addresses, and promised them that if we needed them we would communicate with them; they are mostly foremen for digging gangs; one especially seems to have had charge of the laying out and excavation of the joint pits. If you should need any of these men, [778] communicate with us and we will send them forward.

The Ferry foundation is up for bids on the 16th. I do not suppose you will care to rustle it again; if you do, you had better show up. Understand about the same number of plans have gone out—13 or 15; also understand that Bateman Brothers claim that they are going to enjoin the Harbor Commissioners from entering into contract with anybody but themselves. You will remember that they were the low bidders before, and brought suit to compel the Harbor Commissioners to give them the contract; the suit was decided against them; they now threaten to bring new suit.

Yours truly,

J. McMULLEN.

[Endorsed]: Filed Mar. 2. 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "P."

McMullen v. Hoffman, Defts. Ex. P. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., May 18th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Oregon.

Dear Sir: Yours of May 15th at hand and noted.

Mr. Wood attended the letting at Sonoma for us, and the bids were not opened. The matter went over to the July meet-

[779] ing to be readvertised on account of some illegality or want of funds in this fiscal year. Mr. Wood is not here now, but I delivered your papers to him, and told him to take address off them, and to slip them in quietly. You will understand that he did not care to call for your papers after the bids were rejected.

You had better write to the clerk, W. F. Wines, and have him return them to you. The bids that were submitted were on a fight; no pool.

Have you heard from Foy yet and how does it look for starting the work early in June?

We got the Ferry foundation the other day—\$248,000.00; it was wide open, and, as you see, we were out for the job. I think the other boys, mainly were faking; afraid of it. We beat them, as you see, about \$42,000. I do not think we could have gotten \$40,000.00 more for the work; as it was our bid was several thousand dollars above the architect's estimate, and the chairman of the Board told me, privately, after the bids were opened that they would not have awarded the contract at a much higher price than we did; of course I do not know how this might have been. However, if I had known the boys were all so far away from me; I should have tried (the board) on for about \$25,000.00 more.

It is conceded that the job is worth about 25 per cent or \$100,000 less than it was at the former letting, so you know whether there is anything in it or not. With fair luck, we think it will be a fair contract; we believe, in fact, that it is good for 10 per cent.

Yours truly,

J. McMULLEN.

Received May 20, 1893.

Answered May 23, 1893.

[Endorsed]: Filed March 2, 1896. J. A. Sladen, Clerk.

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Defendant's Exhibit "Q."**McMullen v. Hoffman, Defts. Ex. Q. G. A. B. Ex.****San Francisco Bridge Company.****San Francisco, Cal., June 6th, 1893.****Mr. Lee Hoffman, Portland, Or.**

Dear Sir: Mrs. Hoffman and Hawley were in to see us last Saturday; they went out to the house and took lunch. I think Mrs. Hoffman is looking very well, and Hawley is growing like a weed.

We have the forges ready and can ship them any time.

I saw Capt. Taylor a day or two ago, and he said he had just gotten in from Portland on his way home from the east; he said when he was in Portland (which was the middle of last week) Wolff & Zwicker had not started to make any pipe up; I suppose they are started by this time.

Mrs. Hoffman told me that she heard you say that Foy had just got there before she left.

I would like to know when you expect to begin to lay pipe.

We have the addresses of several men here, recommended by the Risdon and Spring Valley, as foremen for trenching and pipe laying, etc., that we will send to you if you so desire.

[781] Bob Moore told me that we could have the use of the caulking tool for the pipe line for \$500.00, and I told him this was satisfactory. Don't you think it is worth this to have on the ground there to hold the caulkers down with? If we are going to do anything with it, we would have to have 2 or 3 of the tools, which would cost us something. I do not know how much—\$75.00 or \$100.00 apiece, I believe.

When Wolff & Zwicker get to using this I think you will see that it is a very efficient tool. Let me know about this, and how you are getting on generally.

With regard to money matters, Lee, I expect it will take a little money to run the job the first few months, until we begin to get decent estimates, but I do not think it ought to take a great deal if we keep old man Smith's estimates up full and prompt. What I would like to do about the money is to put up our joint note, the Bridge Company's note in conjunction with yours, there in the bank, and open a joint account for you to run this job out of. I have no spare cash just now to put into it, and I would like to know what you think about

Julia E. Hoffman, Executrix, etc.

this and if it will be satisfactory to you, and how much money you think it will take.

Am sorry you did not get time to come down here before you began to lay pipe, as it will be difficult for you to get off now.

Yours truly,

J. McMULLEN.

Defendant's Exhibit "R."

McMullen vs. Hoffman. Defts. Ex. R. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., June 15th, 1893.

Mr. Lee Hoffman, No. 53, Worcester Blk., Portland, Or.

[782] Dear Sir: Yours of June 9th, inclosing schedule of wages that you propose to pay on the pipe line, at hand and noted.

When you get started and need any more boilermakers or riveters we will see if we cannot rustle up some more men at the prices mentioned.

We have a pair of good, large, strong horses out at pasture, in Colusa county, where we built the irrigation ditch; they have not done anything for a year and a half. If you are going to buy some, I think it would pay to have a man take these horses through to Portland, as I do not think it would cost more than \$75.00 to get them there and I think they ought to be worth \$200.00 or \$250.00 when they are once there, and they are worth nothing where they are. If you have not already bought horses enough, and can use these, and are willing that I should send these horses up, I will do so, and you can credit me what you like for them.

I did not think it would take so much money to carry that job as the amount you mention. I do not think so now. I do not understand that you purpose to pay anything each month until you get your estimate for the preceding month; then, as you get 90 per cent of what you do, it seems to me that we ought to run the job after we get it started, and the plant and camps on the ground. Later on I shall not be so hard up, but for the next 2 or 3 months I shall not have a dollar to put into anything.

I think, from what I can learn here, that the financial situation is very much exaggerated, and that it will all be over in-

[783] side of 60 days, and I believe that there is plenty of money there in Portland. I shall get up there by-and-bye and see what I can do.

I saw Mrs. Hoffman on her return from the valley the other day; went to hotel again to-day, but she was not in; understand that she intends leaving to-night or to-morrow night; am very sorry that Mrs. McMullen is out of town, and that she cannot entertain Mrs. Hoffman; we are at Blythedale, Marin County, for a month.

Let me know how the pipe goes together, and how fast they are able to make it; they ought to be pretty well started by this time.

Yours truly,

J. McMULLEN.

Received June 18, 1893.

Answered June 20, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "S."

McMullen v. Hoffman. Defts. Ex. S. G A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., July 6th, 1893.

Mr. Lee Hoffman, No. 53 Worcester Blk., Portland, Or.

Dear Sir: We send you per this mail copy of a paper read by Clemens Hershel on the works of the East Jersey Water Company, before the New England Water Works Association, which was sent us by Mr. Catt. We enclose Mr. Catt's letter [784] which accompanied this report. Perhaps you may find something in the report that may be of benefit to us.

We enclose you copy of list of tools and plant shipped by Lockwood from Seattle; we do not know whether he sent you a copy of this or not.

We also send you statement of what we have charged on our books against the job to date.

Now, Lee, as to finances: I have never been so hard up since I have been in business as I am at the present time, and it is mainly due because people do not pay. We have over \$30,000 out that it is utterly impossible to collect in the present state of the money market, although all of it is overdue; some of it many months overdue; some of it many months overdue. Secondly, we got loaded up with a lot

of county warrants at Seattle and Spokane. Thirdly, while our Eastern business has been first-rate and successful, yet the returns have been much slower than we anticipated; this has been caused mainly by our having a loan in New York, with irrigation bonds as collateral, and the financial stringency there caused our New York bank to make us take up this loan. I hope you are in position there to handle that business for the first 3 or 4 months; after that time I think we will be in shape to stand in and pay our part of whatever may be needed. I am willing to pay any interest that you think reasonable, and am also willing to put up my individual or the Bridge Company's note to guarantee the payment with any bank there, if you so desire. Of course, I know that you are running the job with just as little cash as possible. I thought, however, that Smith would allow us estimates on the rivets and fittings up-
[785] on their delivery in Portland.

I need not tell you what you already know; that is, there is a great deal in keeping your estimates up full, and getting in everything. Neither do I wish to interfere with your method of doing business, as everybody has their own way, but if I were running it, I would not pay anything on account of it except my contracts and labor till I was in easy circumstances; in other words, I would make the people carry me with whom I did business. That is what we do.

I will be glad to get a letter from you, and to know how you are getting on laying the pipe, and also if you can pack the job for a few months.

I am informed, by people who are in a position to know, that finances are sure to be easier from this on, and I think within 60 days they will be in their normal condition again. Don't you think you can arrange to get a loan up there on our joint notes of \$10,000.00 or \$15,000.00 to carry on this job from Ladd & Tilton? I suppose you would not care to open an account with anyone else. I did not know but that you would like to have this arranged in this way, and pay all bills on account of that job in this way—out of a special bank account—instead of running it in with your own bank account. Let me know about this.

Now, Lee, I do not want you to think that I want to fall down, or go back on you. I believe that you know that we did our part toward getting the job, and before we get through

I am satisfied that you will concede we have done our part
[786] toward executing it.

By the way, do you think Foy is the right man in the right place? How do you like him?

I have your letter of the 20th of June.

Our man tells me that he reported to you about the pipe left at the hotel; am sorry you could not recover it.

With regard to the charges Lockwood has made for the stuff, I do not know anything about it; I leave it entirely with you to make them whatever you see fit.

How do Wolff & Zwicker get on manufacturing?

Hope to get a letter from you shortly.

Yours truly,

think about this?

J. McMULLEN.

P. S.—We are in receipt of the profile and specifications from Lockwood for the Eleventh Street Bridge at Tacoma, which is a large and expensive job. We are going to send east to Catt for bids on the material. If you want to, we will go in with you on this job, Lee, and pool our issues, and see if we can get the job on joint account. I think we will have to bid for the work; do not believe it can be pooled. What do you think about this?

J. McMULLIN

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[787]

Defendant's Exhibit "T."

McMullen v. Hoffman. Defts. Ex. T. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal, July 22nd, 1893.

Mr. Lee Hoffman, Portland, Oregon.

Dear Sir: Yours of July 14th and 17th at hand and noted.

I am extremely sorry about the rivets. Moore of the Risdon always and often cautioned me about the rivets; told me the trouble they had had on different jobs about them, and you will remember I wrote you about this. However, the only thing to do is to get them right as soon as you can possibly.

About the hard digging, I am a little surprised at what you say about its costing 50 cents a yard when you get the stuff out. I think, however, that when you have done 5 or 8 miles of it you will find this cost will be reduced. You know a new

job always costs more at first, until the men get accustomed to it, and know exactly how to do it. I would not wonder if the excavating and pipe laying for the first month or two would cost you from 25 to 40 per cent more than it will after you have been working for six months.

How about the pipe riveting and pipe caulking labor? Is it cheap and good and plenty?

I think steam to plow with will be economical and efficient, and the sooner you adopt it, the better, and the more you will save. A good big donkey engine with $\frac{3}{4}$ or $\frac{1}{2}$ inch wire cable will be about right.

[788] I am glad that you find Foy's assistance valuable.

I see that the submerged pipe is advertised for August 15th.

I hope to get up to Portland by that time, or sooner. Catt has already received the specifications. I enclose you a copy of a letter from him on this subject. I do not know whether he is right about this or not, but I do know that work like ball joints or in cast-iron work with machine work on it, is about a cent a pound cheaper in the east than it is here. I think the most important thing on this job though is to pool it. To this end you ought to know exactly who makes inquiries about it, and who gets specifications. I infer from Catt's having specifications that they have been sent east, and that it is advertised in the east, although I have not seen anything of it as yet. Catt can probably find out who is figuring on it on that side, and perhaps he can corral them when the time comes. I have not seen the specifications and plans, but presume that they are in such shape that a man would not have to be on the ground in order to bid. Kindly send us a set of the blue prints and specifications.

Now, Lee, with regard to money: I recognize that it is incumbent upon me to put up half of the money to run that job with, and I stand ready to do anything that it is possible for me to do, but for the last 60 days I have had all I could do to get along, and it does not look a bit better for the next 60 days to come; after that time we will begin to get in some money. I think we ought to be able to raise a loan in Portland on joint account. I am not only willing to put up the Bridge Company's note for it, but I am willing to deposit as collateral with said note 14,032 out of a total of 25,000 shares of the capital stock of the company. A fair valuation of the company's

[789]

assets, over and above its liabilities, shows it to be worth over \$375,000.00; this would make this stock worth \$15.00 per share, or total of \$210,480.00. Don't you think it would be better to borrow the money on joint account there, so as to use your credit and ours, too, and instead of my borrowing \$10,000.00 let us go in together and borrow \$20,000.00, or \$30,000.00, or whatever sum is needed? Open a bank account. We certainly ought to get this money in Portland, Lee; that is the proper place, that is where the work is. I am willing to give my note and pledge my stock in the company with you and borrow the money from an individual—some capitalist, you should know some one—if you prefer. I am willing to do anything that I can do, and were it not for this unlooked-for financial stringency, I could probably have sent you the money from here, but, as I have explained to you in my former letters, you know how I have been crowded on account of this stringency.

I note what you say about Wolff & Zwicker having a soft contract. I always thought we could have let that contract to them for about \$25,000.00 less than we did, but, however, I am glad that we let it to them, as I am satisfied that they have spent \$40,000.00 or \$50,000.00 for plant, and when a man does that he ought to make some money. I still believe with you, that there is money in the job.

Yours truly,

J. McMULLEN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[790]

Defendant's Exhibit "U."

McMullen v. Hoffman. Defts. Ex. U. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., July 24th, 1893.

Messrs. Hoffman & Bates, Portland, Oregon.

Gentlemen: Yours of July 20th at hand and noted.

Our agreement with Foy is that he is to be paid \$250.00 per month, same as we have always paid him. Now, I rather think that when we had a camp we always boarded him for nothing here in California, and think they did the same thing up there.

Enclosed you will find copy of our letter of Apl. 22nd to Mr. Foy; this, with the letter of May 12th, are all the letters we wrote him on this subject. I was thinking you had a copy of this letter, but find you have not. Of course his traveling expenses around on the job I would expect we would pay, so it really amounts to \$250.00 per month and his expenses—as we understand it; we think this is what we have always paid Mr. Foy.

Yours truly,

SAN FRANCISCO BRIDGE COMPANY,

By J. McMullen. Prest.

Received July 26, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[791]

Defendants Exhibit "V."

McMullen v. Hoffman. Defts. Ex. V. G. A. B., Ex.

San Francisco Bridge Company.

San Francisco, Cal., August 3rd, 1893.

Mr. Lee Hoffman, Worcester Blk., Portland, Oregon.

Dear Sir: We note yours of July 31st.

It is not possible for me to make the remittance you demand. Were it, you would not have to demand it. It is possible that I may be able to send you \$5,000.00 next week; this, however, will depend on whether we succeed in making a certain collection. I can only tell you that I will do my utmost to furnish some funds to help handle that job, and for what money and time you put into the job more than I do, I trust I shall be able to make you a satisfactory compensation.

I think you are too sensitive about paying everything when it is due; no one here does that these times.

I will tell you what I do in my business: when I have money I pay, and when I do not have money, I tell the people so, and let them wait, and people with ten times the money and resources that I have treat me in the same way. Our labor is the only thing that we strain a point to meet promptly.

Had I been running that job, everything I bought for it I should have agreed to have paid when I received my estimate on it—when it went into the work. A firm with your credit could readily have done this. This is what we do invariably.

[792] If, as you intimate, the city should not pay it seems to me that would be sufficient reason for your not paying, and that you

ought not to be worried on that score. It is hardly fair for you to intimate that I asked or expected you to furnish all the money and do nothing but run that job, after I have explained to you that it was because I was utterly unable to send you any money at this time. Neither is it just for you to accuse me of going into other schemes and taking other work and putting my money into them. As a matter of fact, we have not taken a contract or put a dollar into anything since we went with you into the waterworks contract, and furthermore, we would have been in funds to pay our proportion of it had it not been for the financial stringency and inability to collect, which I reported to you in detail. If you allude to the job we are doing in Arizona, I wish to say to you that job is being done on a commission basis—not a contract at all, and instead of requiring money for running it, it has been a source of income to us, as we get 10 per cent on the labor and all expenditures monthly. I realize that it is not the explanations that you want; that it is money, and I will try and see what I can do. Meantime, stand them off.

Your etc.,

J. McMULLEN.

Received Aug. 5, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

793]

Defendant's Exhibit "W."

McMullen v. Hoffman. Defts. Ex. W. G. A. B. Ex.

San Francisco Bridge Company.

San Francisco, Cal., August 4th, 1893.

Mr. Lee Hoffman, Worcester Bk., Portland, Oregon.

Dear Sir: Yours of August 2nd, relative to caulking tool, at hand and noted.

We have just interviewed Risdon, and wired you as follows: "It will require one of these compressors to each tool; can furnish two. Moore thinks one tool ought to do the caulking as fast as you require. Have written."

It seems to me that the best way to do this would be to set up one compressor and one tool first with donkey boiler on a wagon; then if it should do the caulking as rapidly as you require it done, use one only; if not, we can get a second one, and put it on the same wagon, and use the same boiler.

The steam cylinder of compressor is 6 x 6, and reservoir a kitchen boiler, obtainable at any hardware store, 1½ feet in diameter, and 5 feet long. The Risdon have two of these on hand, and we can ship them at any time; also the tools.

[794] I show the Risdon your letter, and they are a little inclined to recede from their arbitrary and advance price for the use of this patent; I think they will accede to the original proposition of \$500.00, and we pay for the tools besides—which is about \$75.00 apiece. I am quite sure that before that job is done you will want this tool on the job—even if you do not use it; it will hold the strikers down. I wrote you this before. Just as sure as the men think that you are depending on them, they will get together and jump you when you are in a hurry. I think I would adopt the machine and operate it. You see how it works for Wolff & Zwicker, and you can tell for yourself whether it is more economical than hand work; it seems to me that it must be; it is only a question of operating it skillfully so as to make tight work.

I hope the committee do not default in their payment. The Risdon are terribly anxious about this, as they claim to have delivered \$50,000.00 worth of material and to have \$40,000.00 worth on the way, and I know that they are awfully hard pressed for money like the rest of us.

I am glad that you think that you are getting along well. I think, too, that three miles in practically the first month is excellent work. Sorry that the digging is so hard, and that it is costing so much.

I am going up there one week from Saturday; will be there week from Monday morning.

I do not want to let go on that submerged pipe; want to get the job; I think we can make \$25,000.00 on that job, but we must pool it; to do this, we will have to let the secretary, Frank T. Dodge, in, and if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened, and we will gather in everybody that is personally represented; don't think there is many.

Riffle has applied to MacNeal's agent here for bids on the cast iron, but we can control MacNeal's man here; he wants to work with us; his price will be about \$32.00 a ton, and freight and insurance, primage and use of money, etc., which will

[795] amount to about \$12.00 a ton, and which will make it about \$44.00 a ton.

I enclose you a rough, approximate estimate which our Mr. Wood has made, which shows that the wrought-iron pipe is not in it at all; that it will cost \$20,000.00 more than the other.

Another thing, Lee: you want to see Smith & Watson, and see that they do not form any combination with anyone else to bid on this work; take them in by giving them the cast iron, and hold them down to about what it is worth.

The estimate we send you is made off-hand, and is rough and only approximate.

I think you can arrange to get Dodge into our camp.

About money, Lee, I feel just as badly and just as much annoyed at being unable to do my part as you do. I have been rustling to-day to see if I could not raise a loan, but thus far I am unable to do so. I have some hopes of getting \$5,000.00 next week; it is 6 months' interest on our irrigation bonds, payment of which has been restrained by injunction, but we hope to have it removed next week. If I get this money I will send it to you, although I am awfully hard pressed on every side here.

I think you are very foolish to try and meet every payment promptly there. I would stand them off for everything, or pay them fifty per cent. or whatever I could out of my estimates, and such things as supplies for camps I would not pay for 6 months, if I did not feel like it.

[796] Now, do not construe anything that I have said as wanting to run the job, but I think you are too thin-skinned and too sensitive about this paying.

Yours truly,

J. McMULLEN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "X."

McMullen v. Hoffman. Defts. Ex. X. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., September 14th, 1893.

Mr. Lee Hoffman, Worcester Blk., Portland, Oregon.

Dear Sir: Your letter of September 11th at hand and noted. My idea of the proper solution of the financial difficulty of

the pipe line contract (assuming that the committee will be unable to sell more bonds, and that they will be out of cash, which we do not understand is a certain thing yet, as we understand that they have extended the option of purchaser to October 1st), would be: to deduct the board bill from the payroll, which would leave the latter in the neighborhood of \$15,000.00; apply the \$9,000.00 to liquidate this; take, say \$10,000.00 in bonds, get a loan of say 75 cents on the dollar on this amount of bonds and liquidate balance of payroll; stand off supply accounts entirely, as it is a perfectly fair proposition [797] so to do in view of the fact that the city has not paid you, and no reasonable business man would object. If you have freight bills or contract obligations to meet, which could not be stood off, would advise taking further bonds and hypothecating them as above suggested, and meet such obligations. As I understand contract Wolff & Zwicker and Cook and Kernan they can only demand pay as we receive it from the city, and not otherwise. There is not any doubt but that ultimately the city will succeed in selling these bonds, and probably in 60 or 90 days, at which time you could turn the bonds into cash; have it so understood with the water committee that the bonds you thus accept temporarily shall be turned in on the first sale of bonds. I think that with so good a collateral as these bonds, there should be no trouble in raising money enough there to pay the balance of this year's labor. If there should be difficulty in this, you could shut down the work at the first of October, at which time the last option given on the bonds will expire. The difference between the interest that the bonds would bear and what you have to pay for money could not amount to a very considerable sum for the limited quantity that would be required to take care of the labor account for a month or two. I have not the slightest doubt but what these bonds will be marketable shortly, and trust that the committee will yet realize by the first of October.

My own finances are in such a condition that it is absolutely impossible for me to comply with your request to furnish you \$10,000.00 before the 20th of this month. Neither can I accede to your proposition that I should withdraw from and sur- [798] render my interest in this contract. Neither have I ever intimated in any way that I would do so, as you imply in your letter, except in my letter to you of March 14th, 1893; to the

proposition contained in said letter I am still open; or if you desire to make me an offer for my interest in this contract, I am open to the proposition.

I think, Lee, that in your letter you considerably exaggerate the financial difficulties. I do not believe it will be long until the committee will realize on their bonds, and for the inconsiderable sum it will require to take care of the labor, outside of the board account, I believe that you can readily secure a loan of 75 or 80 cents on the dollar for a block of these bonds, which the committee stand ready to give you on account of the contract. Neither do I believe that you would stand any loss on these bonds, as I think they will shortly be at a premium.

Any reasonable or equitable arrangement that you may make, in this or any other direction for money, will meet my approval, and I will cheerfully bear my proportion of the interest, and for what additional money you may have in the contract more than I have contributed, I am prepared to pay any reasonable interest.

It looks to me very much as if, should the committee be in funds again, the job would be on velvet by the end of this year; that is, that your receipts would be quite up to your disbursements. I would be glad to know if you agree with me in this.

I have heretofore offered you the credit of the San Francisco Bridge Company to assist you in making any financial arrangement that you might desire, if the same would be of any value to you.

I trust that things will look brighter shortly, and will be glad to hear from you further on this subject.

Yours truly,

J. McMULLEN

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "Y."

McMullen v. Hoffman. Defts. Ex. Y. G. A. B., Ex.
San Francisco Bridge Company.

San Francisco, Cal., Sept. 18th, 1893.
Mr. Lee Hoffman, Worcester Blk., Portland, Oregon.

Dear Sir: Yours of September 16th at hand and noted.

Before receiving the same, Captain Taylor, of the Risdon Iron Works, had showed me a letter he had received this

morning from Mr. Failing, chairman of the water committee, saying that they had sold another \$100,000.00 worth of bonds, and that the money would be there not later than the 30th—probably several days sooner.

I should have supposed that you, too, would have been advised of this fact, as his letter was also written on the 16th.

[800] This will undoubtedly make the financial situation very much easier than you anticipated. If you get an estimate of \$66,000, I suppose about one-half of it goes to Wolff & Zwicker and Cook & Kernan on their subcontracts; perhaps a little more; the other half of it should be abundant to liquidate your \$22,500.00 payroll (in which latter I understand there is included the board account which must amount to \$6,000.00 or \$7,000.00 which, according to my ideas of business need not necessarily always be cash every month), but assuming that it is cash, it would still leave you in the neighborhood of \$10,000.00 to pay for other supplies with, or to reduce the amount of money that you have invested in the contract.

[801] You say that you have done business for many years to suit yourself, and will keep on doing so. Now, Lee, I have never made any reflections on your methods. Several months ago, before we started on this work, I told you my ideas of how to conduct it and, with all due respect, I still think I was pretty near right in it. I think you should have made everybody who furnished any supplies for that contract wait for their pay until we got it out of the job; that is, until those supplies were allowed for in the estimate. I have a job here, amounting to a quarter of a million dollars, and every subcontract on it is made on exactly these lines, and you know very well that all large works, works of magnitude, are conducted on these lines. When a party having a contract has a reasonable credit, there is no trouble in placing subcontracts and supply purchases on this basis, and we recognize the fact that your firm had an excellent credit. You elected to differently. You elected to make contracts, and allow people to draw on you when the goods were shipped. Now, of course, if you pay for everything in advance, it may take \$100,000.00 to run that job, but it does not follow that the job could not have been successfully run on \$10,000.00 or \$15,000.00.

I hardly expected such a proposition from you, Lee, that you would refuse to recognize me in the contract if I did not do

thus and so. You must understand that nothing that you can do will change my rights in the premises, and if you attempt anything of the kind you will only injure yourself. If I were in a "kicking" mood and wanted to find fault I might have as much reason with some things that you have done in connection with that work as you have to upbraid me for my shortcomings, but I have no desire to recriminate.

I trust that on more mature reflection, and with the better outlook from the financial horizon, you will see the folly of the proposition that you put forth in your letter.

I assure you, Lee, that you will have no occasion when you get through to have any misunderstanding or row with me, unless you persist in making one; if you do, I shall have to accept the situation.

Yours truly,
J. McMULLEN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[802]

Defendant's Exhibit "Z."

McMullen v. Hoffman. Defts. Ex. Z. G. A. B., Ex.
Hoffman & Bates, Room 53, Worcester Block, Portland, Oregon.

Portland, Oregon, Jan. 23, 1893.

J. McMullen, Esq., San Francisco, Cal.

Dear Mac: The Bull Run pipe line will be let about March 1st and it will be wrought iron for most of the line. The committee will take bids on cast and wrought iron, but the cast pipe will have to be the standard sizes, and so I am satisfied the O. I. & S. Co. cannot get more than about 8 miles. Now, Mac, this is a pretty large contract and requires a good deal of capital, and I think we ought to put up some kind of a combination on it. I do not care to have this contract all alone, and I was thinking it would be a good plan if you, Risdon Iron Works, Wolff & Zwicker, and myself, would go in on it together and take the work. I am willing to go in with you alone on the contract, but both the Risdon and Wolff & Zwicker are strong teams, and I think if we would combine we could take the contract and make more out of it than if anyone went in for it by themselves. If you think favorably of this plan, you see the Risdon people and I will see Wolff. Let me know

Julia E. Hoffman, Executrix, etc.

563

at your earliest convenience just how you feel about this. The only people I fear up here is Wolff & Z., and I think if we combine this way we would have a very strong team. I expected to be in San Fran. before this time, but things have come up so that I could not get off.

[803] Now, Mac, I don't think we will be able to put up a pool on this work unless we could take in the O. L. & S. Co., and I doubt it very much; if they would come in of course if we found out that we could put a pool on it, each one of us could go in separate.

Let me know just what you think about it.

I see by the papers that during the last storm you lost a large number of bridges in California, so I suppose you are very busy. There is not much in sight up here for the coming year.

Yours truly,

LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "A 2."

McMullen v. Hoffman. Defts. Ex. A2. G. A. B., Ex.
Hoffman & Bates, Room 53, Worcester Block, Portland,
Oregon.

Portland, Oregon, January 30, 1893.

J. McMullen, Esq., 42 Market St., San Fran.

Dear Sir: Yours of the 26th at hand and note what you say about what the Risdon people not wanting too many partners. I have been talking with Wolff in an off-hand way, telling him that I thought it would be a good scheme if such a combination could be made, but I think W. & Z. and the Risdon people [804] have some kind of a deal, so I did not say much. As you say we must do some rustling in the east if we want this work—now, my idea is, to get this iron punched and planed in the east, so that all we would have to do here would be to roll it when it came; that would save a lot of machinery, and I think it could be planed and punched cheaper in the east than here. I will enclose you a list of what it will take and the strength required; this will have to be iron (not steel), and I think if you could give this to Mr. Catt, and if he has not got the time to look after it, he could give it to some Iron Broker, and let him

get us good prices and we ought to get this work, or at least part of it. I will go out over the line as soon as the weather settles a little. The specifications are not yet out, but expect to get them to-morrow and will mail you a copy. The committee estimates that it will take $2\frac{1}{2}$ million dollars, to complete the entire work. We would not have to bid on all if we did not wish to. About Wolff & Zwicker's financial ability—they can get all the backing they want here and their credit is very good.

I don't hardly think I will be in San Fran. until after the contract is let. Why could not Geo. W. Gibbs give good prices on the plates? He knows all the plate mills, and ought to do the work on a very small per cent on such an order as this would be. Think it might pay to see him. The O. I. & S. Co. will bid on the entire contract unless we could get them off as you suggested. Any way, the time is short, and we will have to rustle hard to get in shape to make a good bid.

Yours truly,
LEE HOFFMAN.

805]

2000 tons No. 6	B. W. G. 60in. x 138 in.
200 tons No. 4	B. W. G. 60in. x 138 in.
200 tons 5-16 in.	B. W. G. 60in. x 138 in.
800 tons No. 8	B. W. G. 60in. x 112 in.
1500 tons No. 6	B. W. G. 60in. x 112 in.
500 tons No. 4	B. W. G. 60in. x 112 in.
5200 tons total.	

Average length, given—sheets all 60 in. wide.

24 miles of 42 in. 35 in. and 33 in. pipe.

Above material to be iron. Specimens cut length ways of sheet to test as follows:

50000 lbs. per square inch ultimate strength.

25000 lbs. per square inch elastic limit.

15 per cent elongation in 8 inches.

20 per cent reduction of areas at fracture.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant Exhibit "B 2."

McMullen v. Hoffman. Defts. Ex. B2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and Gen-
eral Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, Feby. 3, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir: I left an order with Col. Smith to-day to mail you
5 copies of specifications, as per your telegram. He expects
to get them from the printers so that he can mail them to you
[806] this P. M. or to-morrow sure. You will see that the work is all
split up, so I don't think it is as good for us if it had been all
let in one bid.

I will do what I can to get prices on the iron, and when you
come up we will make up our mind what to bid on. We ought
to get part of this work anyway.

Let me hear from you when you expect to be here.

Yours very truly,

LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "C 2."

McMullen v. Hoffman. Defts. Ex. C2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and Gen-
eral Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, Feby. 8, 1893.

J. McMullen, Esq., 42 Market St., San Fran.

Dear Sir: I herewith send you strain diagrams on file for
the bridges, profiles of the crossings, and details of the and
profile of the bridges. The general plans I cannot get now,
but expect to have them to-morrow, and will then mail them
to you. The engineer has changed his mind on the steel ques-
tion and has concluded to ask for bids on steel also, but iron
will be preferable all things being equal; and instead of hav-
[807] ing one pipe, 33 in. diameter for the submerged pipe, 2 26 in.
pipes will be preferred. I will advise Mr. Catt about this.

Yours truly,

LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "D 2."

McMullen v. Hoffman. Defts. Ex. D2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and Gen-
eral Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, Feby. 11, 1893.

J McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir: Have mailed you under separate cover to-day general plans for the three bridges. I did not send these to Mr. Catt as it is like pulling teeth to get prints, as they cannot make them fast enough. I sent him the strain diagrams and I think that will be sufficient for him to get prices on, as I am sure the engineer will not be particular about details after a person gets the contract.

Now, Mac, you are altogether mistaken if you think the O. I. & S. Co. will not bid hard on the entire pipe line; they will be about as low as the wrought iron men, if not lower. The committee will not pay any more for the 24 miles from Mt. Tabor to the head works, for cast iron than they will for wrought iron, and I doubt it very much if they would take cast iron for that part at all. However, the O. I. & S. Co. have a big pull on the committee, and if they get down as low as the wrought iron, they may be able to pull it through. Get the very best prices you can on cast iron. I will try and get prices from the O. I. & S. Co. on pipe, and will then see and have a talk with them and find out what they want. This work will be let to the lowest bidder no matter who is as long as he is responsible. I, of course, think the bids can be manipulated some way that we could work on the commission after they are opened. We are to work on the matter and will have our figures in shape by the time you get here.

I think the parties that get the contract for manufacturing and laying the pipe ought to furnish the iron, still there may not be much money in the furnishing.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2. 1896.

J. A. Sladen, Clerk.

(809)

Defendant's Exhibit "E 2."

McMullen v. Hoffman. Defts. Ex. E 2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and Gen-
eral Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, Mar. 10, 1893.

J. McMullen, Esq., 42 Market St., San Fran., Cal.

Dear Sir: Yours of the 8th inst. just received and contents noted.

I just got contract signed up a few minutes ago. It has been uphill work, but everything is all right now. I am making out Wolff & Zwicker's contract now; they will make the pipe here and pay us the difference in the hauling from Fairview and Portland, which will be about \$6,000; of course we want it to come over the Union Pacific, if possible, as we want many favors from them; however, we are not so very particular about that.

Now, Wolff & Zwicker take it just as we spoke of (\$0.014), ready to transport to the ditch. Wolff will go to San Francisco to get plant to-morrow evening; I think he expects to get most of it from the Risdon folks.

Will send you copies of contracts as soon as I get more time, and also profiles as soon as I can get around to it.

Hope we will be able to buy the Risdon people out, but I think \$15,000 ought to do it, and we would want their prices then, as we could not afford to pay our prices at that.

I note the estimate you sent me; I don't think the committee would have it hand-riveted, anyway Wolff will take it, so that [810] is disposed of.

I don't think we can pull the submerged pipe throughout our bid now. However, we will lay for it and try it the next time. About me having enough pull on the committee to have it readvertised, that is very doubtful. I think we can pool it the next time, as the fellows will have more respect for us, and won't think we are faking.

I will try and find out the bid of the O. I. & S. Co. for laying it. I don't think it was filled in, at least that is the way I understood it.

The bridges went to the Bullen Bridge Co. I think the Pacific and they had an understanding; we worked it all right for them, but Campbell fell down.

I think that we have the best part of the contract, and if we did not make a big mistake in our cost of laying, we will make a lot of money. The Colonel already wants changes, and that is where we get in. Will write you again in a few days.

Yours truly,

LEE HOFFMAN.

D.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[811]

Defendant's Exhibit "F 2."

McMullen v. Hoffman. Defts. Ex. F2. G. A. B., Ex.

Hoffman & Bates. Bridge Builders, Engineers and General Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, March 21, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir: Yours of the 18th inst. at hand. Wolff got back yesterday and says he has made all arrangements for his machinery and expects to be ready to furnish us pipe to lay by June 1st. He seems to be very happy over his contract and thinks he is going to make a lot of money out of it. I am also getting to think he will. I asked him what he paid the Risdon for the plant, but he would not say.

I note what you say about trenching; I don't agree with you on the price we can handle it for, as I am dead sure that we can not take it out of the ditch for 15c, and I still think that a machine might be worked out to do the work with—one that the cost would not exceed \$2,000, but taking it out by hand will be the surest way, and I think we will have no trouble in getting all the men we want.

I think we shall want Foy, although the salary you pay him is large, but if that is the best we can do I suppose we will have to stand it. Will we be required to pay him during the winter months, while we are not working, for there will be about six months that we will not work?

[812] We do not want to start the trenching before we get pipe; in fact, we could not if we wished to, as the pipe line is on the county road and we could not obstruct it.

I will return you the Rochester Specifications & etc. as soon as we get them copied.

Julia E. Hoffman, Executrix, etc.

569

I will make all arrangements for the fittings as soon as I know just what we want.

Mac, we have got an engineer that will burn us up—a religious crank by the name of D. D. Clark. I have done a great deal of work under him, and he is a man that you cannot reason with. He has been with the N. P. R. R. for the last 12 years, and I know him thoroughly. I did not even know that they were thinking of him or I should have talked with some of the committee, but it was too late when I found it out.

Yours truly,

LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "G 2."

McMullen v. Hoffman. Defts. Ex. G2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and General Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, March 27, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

[813] Dear Sir: Yours of the 24th inst. at hand and note what you say about Foy. I think he is the man we want, and hope Lockwood can make such arrangements that will be satisfactory to him and us too.

Mac, I don't think the Risdon and Wolff were in together at all; their actions did not show it, as the time the Capt. and I were out to see the committee he was for us, body and soul, and other things did not go to carry out the spirit of partnership. Mac, in looking over the Risdon's catalogue, we see that the Col. copied their air-valves; now I wish you would get their prices for both 4 and 6 in. valves; our contract calls for 46 4 in. valves with copper air chamber, but he now wishes them changed to 6 in. I would not say anything to the Risdons about the change, but get their prices on both, and I will also get prices on them here. The Risdons know just what they are and ought to give us a good price on them.

Now, I do not think we can handle the material out of the trench for 15 cents, but I think we can do it for less than 20 cents. I think we could sublet it to station men for what Mr. Catt says (15 cents), but I think we had best do the most of it

anyway to protect ourselves, as we have to keep the digging and laying close together and have it under our entire control. Mac, I also wish you would see some of the supply men for water-gates, and see what you can get the 4 gates for, as it seems to me that the price is outrageously high here. We shall want 4 gates, (1 36 in., 1 33 in., and 2 30 in). I don't think we can get a 33 in. gate, so we will have to use 2 26 in. ones; the specifications for same, brass facing, double disk working pressure 150 lbs., and beveled gear laying horizontally. The prices here are about 600 dollars for them; you can tell the parties you ask for prices, that they can have time enough on them to ship by water.

24 in. weighs 3,000 lbs.

48 in. weighs 16,000 lbs.

Yours truly,

LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896.

J. A. Sladen, Clerk.

Defendant's Exhibit "H 2."

McMullen v. Hoffman. Defts. Ex. H2. G. A. B., Ex.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, April 3, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir:—Yours of the 27th ult. at hand and note what you say about the bond. You say the contract don't say anything about a bond. W. & Z.'s contract calls for the same in all respects as our contract—same bond in proportion to the work, which they furnished at the time of executing the contract. I would not think of letting a contract unless we were perfectly secured by a bond.

[815] I have not yet heard from Lockwood regarding Foy. Have you heard anything about him? My idea is to keep all the material taken out of the trench on one side as far as possible, and I cannot yet say what I am going to do with the trenching but think it will pay to try station men, but will know more about that later.

W. & Z. say that they will be ready to make us pipe in about six weeks, but if the weather

continues the way it has for the last month, we shall not want any then, as it has rained every day and the roads are all under water, and it will take a long time for them to get into shape so we can haul over them; however, I am in hopes that the rain will let up soon and the roads get in good shape.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "12."

McMullen v. Hoffman. Defts. Ex. 12. G. A. B., Ex.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors. Office, Room 53, Worcester Block.

Portland, Oregon, April 14, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

[816 Dear Sir: I wrote you on March 27th to get prices from the Risdon folks for the 54 air valves both for 4 in. and 6 in. They furnished the Col. the plans and they have the patterns and know just what they are. The Col. wants 6 in. valves, and I want to know the difference in the cost between 4 and 6 in. I wish to know what the Risdon will do, as I want to let the contract for the specials as soon as I can hear from them. You need not bother about the 4 large gates, as I am getting prices from the factory direct, and we have not decided yet just what gates we will use.

We let the contract for the rivets, and I think got low prices on them; we pay for 7-16 in., \$3.45, $\frac{1}{2}$ in. and $\frac{3}{4}$ in. \$3.2 per 100 lbs. at Wilmington, Delaware.

The weather has not improved any yet—raining every day and the roads are just impassable. W. & Z. are getting their shop in shape, and say they will be ready to make pipe as soon as iron arrives.

Have just received letter from Lockwood of which we enclose you copy. Now, what do you think about this? You know more about Foy than I do—I myself think it is a large salary for the work we have to do; however, if you think it will

May us to take him, please let us know. Will await your answer before I reply to Lockwood.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

[817]

Defendant's Exhibit "J 2."

McMullen v. Hoffman. Defts. Ex. J2. G. A. B., Ex.
Hoffman & Bates, Bridge Builders, Engineers and General
Contractors. Office: Room 53, Worcester Block.

Portland, Oregon, April 20, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir: Yours of the 11th inst., with enclosed lists and prices from the Risdon, were received a few days ago, and also yours of the 18th just at hand. Now, Mac, I want to tell you right at the start that the Risdon take us for suckers, and I don't propose to be taken in by them. I don't know anything about what the tools will cost, but I do know something about specials; the idea of them asking us \$25 for 4 in. air valves and \$21 for manholes, and other things in proportion.

Now, Mac, I don't want any of the Risdon in mine; they may know all about pipe line and we know nothing, but I will take my chances. Wolff & Zwicker are now figuring on what tools we require and we shall in all probability get them here. As I said, I will let you know later about tools; I understand that we require a good outfit to do this work, and don't apprehend any trouble at all in getting it, as there is very little work going on now and plenty of good men. Now, my idea is, not to employ a single boilermaker on the work; I want to keep clear of them if possible. I want to use all bridge men to do the riveting; they will probably not drive as many rivets at first as a boilermaker, but we will have them under our control. You must have some good iron bridge men, and with what we have, think we can get along. We may have to have some boilermakers to do the caulking, but I hope to do that without them. I want absolutely nothing to do with them if I can help it.

[818]

About your Mr. Wood, I think he would be a good man on this work, but have concluded to put Bush in the field, as he has had quite a large experience with the Jersey Works. I

think he is the best man for the place we can get; after thinking the matter over I have come to the conclusion that Foy would probably be the best man we could get, and I think it would be a good idea for you to ask him, and be ready to report about June 1st; that is as soon as we can get started. I think Foy would be a good man to have general charge over all the foremen and everything connected with the work.

Let me know about what you think of doing our riveting with bridge men and how many you can send us that have had experience in that line; I also expect them to do the caulking. We may not get along as fast at first, but I think we will be ahead in the end.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "K 2."

[819] McMullen v. Hoffman. Defts. Ex. K2. G. A. B., Ex.

Hoffman & Bates, Bridge Builders, Engineers and General Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, May 1, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir:—Yours of April 22d I received in due time, but I thought I would be in San Francisco to-day so did not write; things changed so that I could not very well get away, and I had to put off my trip for the present.

Regarding the riveting men from the east, I wrote to Catt to send some out if he could get them, and also sent him a copy of your letter. I also told him to get one hydraulic field punch and shears and send them. I will get a lever punch and shears made here, and if the hydraulic will do the work we expect it to, we will order another set.

I think we can get along without any boilermakers at all; in fact, I have no doubt we can pick up men on this coast that will do us very well; still, if Catt can secure a few good men I would like it.

I enclose you a catalogue of the Cumming Portable Forges; we want the ones on page 2; please get about 12 of these and have them here about June 1st; the price list has them \$35.00,

but we ought to get a good discount. This is a very high priced forge, but every one who has used them tell me it is the very best.

[820] The rain still keeps on and no telling when it will let up. I am afraid the roads will be in such shape that we will not be able to haul even if we are ready June 1st. I went after W. & Z. the other day; I am satisfied they will not have their machinery in shape to run by the time agreed upon. They say they are rushing the Risdon all they possibly can. I told them that you wrote me that the machinery would not leave San Francisco before the 1st of June, so they may go after you. I only did it to stir them up. We have not yet got plans for manholes and blowoffs. The Col. is undecided and changing from one thing to another, but I hope to have him decide on a certain plan within a day or two.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "L 2." |

McMullen v. Hoffman. Defts. Ex. L2. G. A. B. Ex.
Hoffman & Bates. Bridge Builders, Engineers and General
Contractors. Office: Room 53 Worcester Block.

Portland, Oregon, June 9, 1893.
J. McMullen, Esq., 42 Market St., San Francisco, Cal.

[821] Dear Sir:—Yours of the 6th inst. at hand and contents noted. We received the forges sometime ago. but so far have had no use for them. Wolff & Z. have not started their shop and I don't know how soon they will be able to start. They promised to give us pipe in a week, but I hardly think they will—not very much any way.

Foy is out on the work getting his camp started but he will not be able to do much until we get some pipe to lay. I don't know what we will do about the caulking, but hardly think it would pay us to have a machine; however. I will let you know about this later.

I don't think we want any foreman, at least no trenchers; we may want a pipe foreman later.: What we want most is

riveters and caulkers. I will enclose you a scale of the wages that we propose to pay, and if any of the "Risdon" pipe men want to come on this layout, we would be glad to have them, but I think their men want \$3.50 per day and board for 9 hours' work and I am not going to pay it.

About money matters: I do not care to borrow any money, as I have my money all provided for; any way, I doubt very much if we could raise any money on notes until the scare blows over a little. I think it will require about \$20,000 to carry this work along.

I have orderd most all the specials, and of course we will have to pay for them when they arrive. We will have to buy some teams and other plant, and I estimate it will take about the above amount. As soon as the work gets started I will let you know.

Yours truly,
LEE HOFFMAN.

[822] Rate of wages to be paid employees on the Bull Run pipe line, in the service of Hoffman & Bates, Contractors:

Boilermakers	\$0.35 per hour.
Riveters	0.30 per hour.
Holders	0.25 per hour.
Rivet-heaters	0.20 per hour.
Laborers	0.20 per hour.
Board	\$5.00 per week.

To J. McMullen, Esq., June 9, 1893.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "M 2."

McMullen v. Hoffman. Defts. Ex. M2. G. A. B., Ex.

Hoffman & Bates. Bridge Builders, Engineers and General Contractors. Office 53 Worcester Block.

Portland, Oregon, June 20, 1893.

J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir:—Yours of the 15th inst. I received a few days ago. We have not started the pipe laying yet—expect to get started by Monday if the weather is so that we can haul. We left the shop this morning with five loads, but I don't know when they will get out to the place. Foy was in last night and says

823] that he is getting started all right with the ditch, although it is very muddy and the ground soft. I expect to go out in the morning and see how the work is getting along. Wolff & Z. are doing fairly well; they are now turning out about 400 ft. of pipe per day, and by the 1st of the month expect to turn out 600 ft. each day.

About money matters: You don't seem to think it will take \$20,000 to carry this work; I do, as we have to pay for our rivets, gates, valves, & etc., as they arrive, and get payment as they are put in place; of course, I am not going to pay out any more money than I can help. It is out of the question to raise any money up here from the banks at present. However, I am in hopes the scare will soon let up and the banks will let out money again.

I will see Foy and ask him if he wants to buy any more teams and let you know. We have bought some stock besides what we got from you at Seattle, and I don't think we shall want any more for a while, at least until we get started.

Mac, I wish you would step into the Palace Hotel and ask the clerk if they got the pipe Mrs. Hoffman left in her room. She bought me a fine pipe and left it on the mantel there. I don't suppose there is much show of getting it, but they may give it up.

Mrs. Hoffman got back all right and says she had a splendid trip.

Will write you again after my return from the work.

Yours truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.
Letter of July 31, '93, gone—not on file.

824]

Defendant's Exhibit "N 2."

McMullen v. Hoffman. Defts. Ex. N-2. G. A. B., Ex.
Hoffman & Bates. Bridge Builders, Engineers and General
Contractors. 657 & 658 Worcester Block.

Portland, Oregon, July 14th, 1893.
J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Dear Sir:—Yours of the 6th inst at hand. I have just returned from a trip over the pipe line; things are not going very well yet; we have about 1 mile of pipe in the ditch; but

not yet riveted up, as there is something the matter with our rivets; 5 per cent of the heads drop off, and the Supt. has stopped us from going ahead several times, but we are still going ahead trying them, as we think it is possible the fault of the men driving them. I wired to George W. Gibbs for some others, but he has not got them, so have wired to Chicago for rivets, but it will take at least 30 days to get them here, and I don't know what we will do during this time. I don't know if they will let us go on with what we have got and take out the poor ones or stop us altogether. We cannot afford to go on with the ones we have here now.

[825] The trenching is just "Lightning"; after we get down about 3 feet we strike a clay hard-pan, that is just as hard as it can be; we have from 8 to 10 horses on the plow and it wears them right out. Foy is talking of taking an engine out to plow with, and I think we will have to do it. We have about 4 miles of the trench opened and it is costing a great deal more than we get for it; from what I can see now, it costs us at least 50 cents per yard to take that hard material out of the trench. We have about a mile of pipe in the trench and about $\frac{1}{2}$ of it riveted up, and that part of the work would come out all right if we had good rivets.

Now, Mac, I have put in this work just \$10,000 outside of my tools and outfit, and by the 1st month we will have to pay our pay-rolls, rivet and other bills, all told amounting to at least 4 or 5 thousand dollars. We have now on the way trestles and valves, iron for bends, & etc., which will all have to be paid before we get another estimate.

We have got an estimate of \$5,000, all told, for pipe laid and trenching; of this amt. \$1,900 for trenching. By the time we pay W. & Z. and the hauling, we will only have \$3,500 to pay bills with.

Now, Mac, I don't feel like carrying this work alone and as far as borrowing money here on my note, I don't think it could be done; in fact, you cannot borrow here at all. I am in the same boat you are in I have got money coming to me but cannot get it. I am not finding any fault with your part of the work of getting the contract, but you must understand that we did some work and have been working hard ever since, and am willing to do my part, but cannot afford to do it all; therefore, I must ask you to put in your half of what it takes to run

[826] this work. I have started a separate bank account, Hoffman & Bates and I put in \$10,000, and I have not changed my mind as to the amount it will take to carry this work (\$20,000) on in good shape, and I still think we are going to make good money out of this contract, but it requires a great deal of watching. We give by far the best part of our contract to W. & Z. They are coining money as far as I can see.

Foy, I like him; he has had a large experience in organizing forces, and think he is doing very well; of course he don't know anything about laying pipe, but think he will do all right. Bush is out there looking after the pipe riveting.

July 17th.

Since writing the above I have been out on the line again and the rivets are not getting any better. I have now ordered another carload from Chicago (Norway) iron to see what they will do. I made a big kick on classification on the hard material; it went before the construction committee, but got set down on hard. The material is still getting harder and I am doing all the kicking I can but can do nothing with the committee. Col. Smith is all right, but he won't take any responsibility upon himself. If we could get this material out of the trench at any reasonable cost everything would come out all right, as the pipe goes in the ditch in good shape.

Yours truly,
LEE HOFFMAN.

[Endorsed]: (In pencil.)

24,000 ton No. 2 Est. 60 cts.

[827] 45,600 ton No. 1 Est. \$1.00.

2 ton to the C. F. Hinkles.

Solid yard 12 ft. to to

Fishers Quarry, Columbia River.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "O 2."

McMullen v. Hoffman. Defts. Ex. O2. G. A. B., Ex.
Hoffman & Bates, Bridge Builders, Engineers, and General
Contractors. 657 & 658 Worcester Block.

To J. McMullen, Esq., 42 Market St., San Francisco, Cal.

Portland, Oregon, July 20, 1893.

Dear Sir:—We would like to know just what salary arrangements you made with Hugh Foy, as you did not state anything

about salary to him in your letter of May 12th of which you sent us a copy. We understood that we were to pay him \$250 per month, but do not know whether this is to include his private expenses or not. We desire to know your full arrangements in order to act intelligently in this matter.

Yours truly,

HOFFMAN & BATES,

Per Lee Hoffman.

[828] [Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

For Ex. P2, see printer's record, page

Defendant's Exhibit "Q2."

McMullen v. Hoffman. Deft. Ex. Q2. G. A. B., Ex.

Hoffman & Bates, Bridge Builders, Engineers, and General Contractors. 657 & 658 Worcester Block, Portland, Oregon.

Portland, Sept. 11th, 1893.

J. McMullen, Esq., San Francisco.

Dear Sir:—The waterworks contract is very much mixed up. Last Thursday the committee held a meeting and called me in and there told me they had no money to pay me on the 20th of this month, and told me they did not know if they could sell any bonds at all or not, and I could keep on or stop just as I choosed to do. I insisted that it was for them to say if I should go ahead or not, as they had a right to stop the contract, but I did not, as it would involve me with my sub-contractors, but they would not tell me to stop, so I had to keep on. Our estimate is \$66,000.00, and they have \$40,000.00 that they are going to divide equally among all the contractors, so we will get about \$20,000, and after paying Wolff & Zwicker and Cook and Kiernan their pro ratio, we will have about \$9,000.00 left to pay about a \$22,500 payroll, station men included, besides iron gates and supplies besides this month.

[829] Now, Mac, I am compelled to insist that you raise your portion of this money, as I will absolutely not carry this work any longer this way. You will either have to put up your share of the money or let go of the contract, as you agreed to do. I have held off as long as I could with the hopes that I could swing it alone, but I cannot do it any longer. I don't want you to think that I am taking advantage of hard luck you are in

but you can see the necessity of having money. If you will furnish \$10,000 by the 20th. I will carry on the contract the same way I did before, but this amt. I must insist on your furnishing or you must let go, and I will get some one in that will furnish part of the money. I still think we will make some money. We are not going to make very much, but we will make some if we don't have too many leaks after we get the water turned on. Now, Mac, I don't want you to think that I want to take advantage of you, because I don't, and if it was you that was doing this work and I could not do my share I would not ask you to do for me. If I could do this alone I would, but I absolutely can't do it. Please let me hear from you at once, as I must do something with this work before pay day.

Yours very truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

830]

Defendant's Exhibit "R 2."

McMullen v. Hoffman. Defts. Ex. R2. G. A. B., Ex.
Hoffman & Bates, Bridge Builders, Engineers, and General
Contractors. 657 & 658 Worcester Block, Portland, Oregon.
Portland, Sept. 16th, 1893.

J. McMullen, Esq., San Francisco.

Dear Sir:—Yours of the 14th at hand and contents noted. Now, Mac, there is no use for you to tell me how to do business. I have done business here for a number of years to suit me and shall keep on if possible. It is all very well to tell me what to do if you are in S. F., but I am here and know just what is wanted. Now, I want to tell you once for all that unless you put up your share of the money, namely, \$10,000, by the 20th of this month, I shall not recognize you in this contract after that date and shall make such arrangements as I see fit. If the San Francisco Br. Co. has got the credit you claim it has, and I have no doubt but what it has just got what you say it has, San Francisco is the place for them to raise money to carry on their portion of this work. You seem to raise money enough to carry on the Spokane and Yakima work, but you can do nothing for this. Now, there is no use of our talking this matter over any further. I have told you what I want

[831] you to do. If you want to take this work and run it, you can do so. I will put up my portion of the money. But I draw the line on that. Hoping to get your share of the money by the time specified. I am

Yours very truly,
LEE HOFFMAN.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "S 2."

Steel Conduit from Head Works to Mt. Tabor.

Proposals for Manufacture and Laying.

Address, see Article 9
of Specifications.

Portland, Oregon, March 1st, 1893.

Frank T. Dodge, Clerk of the City Water Committee, of the
City of Portland, Oregon:

The undersigned, Hoffman & Bates, of 53 Worcester Block, Portland, Oregon, propose to furnish all labor and materials necessary to complete the work described in the specifications for the water supply of the city of Portland under the head of steel "conduit from head works to Mount Tabor" as "manufacture and laying," at the prices stated below:

[832]	Steel, 11,442,000 lbs.			
	Rivets, 340,000 lbs., 11,782,000 lbs. at..\$.0275	\$	\$324,005 00	
	Manholes, 225, at. 20.00	4,500.00	4,500.00	
	Air Valves, 54, at. 8.00	432.00	432.00	
	Bends—extra joints, 200, at. 30.00	6,000.00	6,000.00	
	Blow-offs, with 6-inch valves, 46, at.... \$20.00	\$ 920.00		
	Waste Pipes, 6-inch steel, 29,000 lbs., at 10	2,900.00	3,820.00	
	Bricks laid in cement	\$		
	Two Stand Pipes, 580,000, at. 21.00	.....	12,180.00	
	Steel Plates, 15,000 lbs., at. .... .08	1,200.00		
	Water Valves, 36-inch, 1, at. 500.00	500.00		
	Water Valves, 33-inch, 1, at. 500.00	500.00		
	Water Valves, 30-inch, 2, at. 350.00	700.00		
	Waste Pipes, 30-in. steel, 40,000 lbs., at .07	2,800.00		
	Foundations, concrete or masonry, 60 cubic yards, at. 10.00	600.00	6,300.00	

Sleeve Joints—

Wrought Iron Sleeves, 7,000 lbs., at \$.07	490.00	
Lead, 3,000 lbs., at..... .06	180.00	670.00

Trestles—

Wrought Iron, 40,000 lbs., at.....\$.064	\$2,560.00	
Foundations, concrete, 400 cubic yards, at..... 8.00	3,200.00	5,760.00

Excavation and Refilling—

Earth, 270,000 cubic yards, at..... .30	81,000.00	
Loose Rock, 10,000 cubic yards, at. 1.50	15,000.00	
Solid Rock, 2,000 cubic yards, at... 3.00	6,000.00	102,000.0

Total, manufacture and laying (See Art.

7 of Specifications).....	\$465,722.0
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833] We enclose herewith a certified check for \$23,300.00, being five per cent of the amount of the proposal, to be forfeited in accordance with the provisions of Art. II of the specifications in case that we should fail to furnish the required bonds and execute the contract if awarded to us within twelve days after the award.

Signature,

See Art. 9. Specifications.

HOFFMAN & BATES,
Per Lee Hoffman.

Steel furnished by the water committee. (See Articles 86 and 88.)

[Endorsed]: McMullen v. Hoffman, Defts. Ex. S2, G. A. B., Ex.

A true copy substituted by agreement in lieu of the original.
Filed Mar. 2. 1896. J. A. Sladen, Clerk.

GEO. A. BRODIE,
Examiner.

Defendant's Exhibit "T 2."

Steel Conduits from Head Works to Mt. Tabor.

Proposals for Manufacture and Laying.

Address, see Article 9

of Specifications. (5)

San Francisco, Cala., March 1, 1893.

Frank T. Dodge, Clerk of the Water Committee of the City of
Portland, Oregon:

[884] The undersigned San Francisco Bridge Co., of San Francisco, Cala., propose to furnish all labor and materials necessary to complete the works described in the specifications for the water supply of the City of Portland, under the head of "Manufacture and Laying (C)," at the prices stated below:

Iron, 11,442,000 lbs.			
Rivets, 342,000 lbs., 11,784,000 lbs. at \$.031	\$365,304.00		
Manholes, 225, at 20.00	4,500.00		
Air Valves, 4-inch, 54, at 10.00	540.00		
Bends, extra joints, 200, at 25.00	5,000.00		
Blow-offs, with 6-inch valves, 46, at 20.00	920.00		
Waste Pipes, 6-inch, No. 14 iron			
Wrought Iron, 15,000 lbs., at .05	1,450.00	\$377,714.00	
<hr/>			
Bricks laid in cement, 580,000 lbs., at 20.00	\$11,600.00	11,600.00	
Two Stand Pipes.			
Wrought Iron, 15,000 lbs., at .05	750.00		
Water Gates, 36-inch, 1, at 250.00	250.00		
Water Gates, 33-inch, 1, at 250.00	250.00		
Water Gates, 30-inch, 2, at 250.00	500.00		
Waste Pipes, 30-inch, 40,000 lbs., at .05	2,000.00		
Foundations, concrete or masonry, 60			
cubic yards, at 10.00	600.00	4,350.00	
<hr/>			
Sleeve Joints—			
Wrt. Iron Sleeves, 7,000 lbs., at .05	350.00		
Lead, 3,000 lbs., at .05	150.00	500.00	
<hr/>			

Trestles—

Wrought Iron, 40,000 lbs., at ...	.06½	\$2,600.00	
Foundations, concrete, 400 cubic yards, at	6.00	2,400.00	5,000.00

Excavation and Refilling—

[835]

Earth, 270,000 cubic yards, at ...	.35	94,500.00	
Loose Rock, 10,000 cubic yards, at	1.50	15,000.00	
Solid Rock, 2,000 cubic yards, at	3.00	6,000.00	115,500.00

Bid C (See Art. 7 of Specifications)—

Total			\$514,684.00
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We enclose herewith a certified check for \$27,300.00, being five per cent of the amount of the proposal, to be forfeited in accordance with the provisions of Art. II of the Specifications in case that we should fail to furnish the required bonds and execute the contract, if awarded to us, within twelve days after the award.

Signature

SAN FRANCISCO BRIDGE CO.,

By J. McMullen, Prest.

See Art. 9. Specifications.

Wrought iron furnished by Water Committee. (See articles 86 and 88.)

[Endorsed]: McMullen v. Hoffman. Defts. Ex. T2., G. A. B., Ex.

A true copy substituted by agreement in lieu of the original.
GEO. A. BRODIE.

[Endorsed]: Filed Mar. 2, 1896. J. A. Sladen, Clerk.

Defendant's Exhibit "U 2."**BULL RUN CONTRACTS.**

Copies of Estimates, March 15th, '93.

Hoffman & Bates, Room 53, Worcester Block, Portland, Oregon.

Bid "A"—Head Works.

PORTLAND WATER WORKS.

Ex. U 2

	RATES		Cost	Bid	Total Cost	Profit	Bid
	Cost	\$					
Clearing and grubbing 2 acres, at.....	\$125	\$					
Trees cut—100 trees.....	3				550	55	605
Excavations:							
Earth—3,000 cubic yards, at.....	.50				1,500		
Loose rock—1,000 cubic yards, at.....	1.50				1,500		
Solid rock—7,000 cubic yards, at.....	1.50				10,500		
Rock under water—100 cubic yards, at.....	10.00				1,000	1,450	15,950
					15,050	1,505	16,555

Bid "A" [See Act. No. 7 Spec.] certified check No. 850 to 1200.

Bid "B"—for Wrought Iron:

Wrought iron, 11,442,000 lbs., F. O. B. Mill, at.....	\$.02	\$			\$228,840		
Freight on " " at.....	.0107				122,429		
Inspection, insurance and inc., at.....					731		
					3.38		
	3.07						

Bid "B" [See. Act. No. 7 Specif.] certified check \$19,500 to \$22,000.

Bid "C"—Manufacturing and Laying:

Receipt and storage 11,442,000 lbs. at.....	\$.0005	\$			\$ 5,721		
Insurance, rejections, inc. at.....	.0005				5,721		
Plant, assumed cost for 25 lengths per day, at.....	.0025				28,605		
Pay-roll—punch, bend, riv. and caulk, at.....	.00375				42,908		
Fuel, Oil—supplies, at.....	.0005				5,721		
Dipping, 2 coats—material, at.....	.002				22,884		
labor, at.....	.0005				5,721		
Testing (25 lengths per day), at.....	.00125				14,303		
Transportation to trench, at.....	.03				34,326		
Laying and riveting, at.....	.0025				28,605		
					1.87		
	1.70						

Total iron, 1,144,800 lbs., fin. on ditch, per lb.....

194,515

19,450

213,965

837]

Rivets, 342,000 lbs., at per lb.	\$ 3.9	\$	\$ 13,338	\$ 13,338	\$ 1,334	\$ 14,672
Manholes, 225, at each	20	.....	4,500	4,500	450	4,950
Air valves (4 inches), 54, at each	10	.....	540	540	54	594
Bands, extra joints 200, at each	30	.....	6,000	6,000	600	6,600
Blow-offs (with 6-inch valves), 46, at each	10	.....	400	400	.....	.....
Waste pipes, 23,000 lbs. (labor only), at per lb	.02	.....	580	580	.....	.....
Waste pipes, 580 lbs., brick in cem., per lb.	16	.....	9,280	10,320	1,032	11,352
Two-stand pipes, labor on 15,000 lbs., at	\$.02	\$	300	300	.....	.....
Four gates, at each	.160	.....	600	600	.....	.....
Labor on 40,000 lbs., at per lb	.02	.....	800	800	.....	.....
Concrete, 60 yds., at	10	.....	600	2,300	230	2,530
Sleeve joints—7,000 lbs. wrought iron, at per lb	.06	.....	420	.....	.....	.....
3,000 lbs. lead, at per lb	.06	.....	180	600	60	680
Trestles (all cast) of 40,000 lbs. wrought iron, at per lb	.06	.....	2,400	.....	.....	.....
400 yds. concrete, at per yd	10	.....	4,000	6,400	640	7,040
Total for all but excavating and refilling	\$ 2.085	\$2,293	\$238,513	\$238,513	\$23,850	\$282,363

V 2

PORTLAND WATER WORKS.

gid "C" (continued.—Mfg. and Laying.

	RATES							
	Cost	Bid	Cost	Bid	Cost	Total Cost	Profit	Bid
Br. forward [all est. but Excav. Refill]						\$238,513	\$ 23,850	\$262,363
Excav. and Refilling								
Earth, 270,000 yards, at	.30	.33			81,000			
Loose Rock, 10,000 yards, at	1.50	1.65			15,000			
Solid Rock, 2,000 yards, at	2.00	2.20			4,000			
					100,000			110,000
					338,513		33,850	372,363
Total bid "C" [see act No. 7 spec.]	2.958	3.255						\$
Certified check \$19,000 to \$22,000								
Bid "E"—Cast I. Mt. Labor to City Park.								
Cast Pipe—6,300 [short] tons at Fon. East.	21.50				135,458			
6,300 [short] tons Ins. and Frt.	8.50				53,550			
6,300 [short] tons, local handlings					63,000	189,000	18,900	207,900
Laying and etc., 6,300 [short] tons (pointing)	10.00				63,000	63,000	6,300	69,300
Manholes, 15, 30,000 lbs., at lb	.04				1,200	1,200	120	1,320
Blowoffs, 6 blowoffs, 1,200 lbs., at	.04				480			
6 W. I. wastes, 1,900 lbs., at	.06				780			
6 Water valves, 5 at	150.00				750	2,010	201	2,211
Air valves [4 inches] 10 at	10.00				100	100	10	110
Bends—Cast iron, 20,000 lbs., at	.04				800	800	80	880
Excav. and refilling								
Earth, 40,000 yards, at	.30	.33			12,000	12,000	1,200	13,200
Loose rock, 4,000 yards, at	1.50				6,000	6,000	600	6,600
Solid rock, 1,000 yards, at	2.00	2.20			2,000	2,000	200	2,200
Excav. Solid, per ton	48.82	48.20			276,110	276,110	27,611	303,721
Bid "E" [see Act. No. 7, spec.]								
Certified check 15,500 to 17,000								

[839]

Bid "F"—(Submerged pipes cast.)					
Cast pipe, 1,082 (short tons) rgh. at mill					
Turning or dressing ends	36.00				
Freight on 1,082 tons and insurance	8.50				
Total 1,082 tons, F. O. B. Portland	38.50				
Dredging 30,000 cubic yards [including local handling]	.27½				
Laying pipes, lead and testing, 4,200 len. feet at	2.50				
		\$	\$	\$	\$
		32,400	41,657	4,164	
		9,497	7,500	750	45,823
			10,500	1,050	8,250
					11,550
		59,657		5,966	
					65,623

Bid "F"—[see Act. No. 7, spec.] check.

Bid "G"—Bridges.					
75 ft. span superst. 27,800 lbs. at					
160 ft. span superst. 116,880 lbs. at					
160 ft. cyl. piers, 7,660					
300 ft. cyl. superst. 285,280					
300 ft. cyl. piers, 11,360					
Masonry (cement fill) 200 cubic yards					
Concrete (cement fill) 100 cubic yards					
Excavation rock, 100 cubic yards					
Earth, 300 cubic yards					
	\$	\$	\$	\$	\$
	.06	1,668	1,667		1,885
	.06	7,013			8,546
	10.00	756	7,709		
	6.00	17,116			20,077
	6.00	1,136	18,252	1,825	
	10.00	2,000			
	11.00	500			
	5.80	200			
	2.20				
	.33	90	2,790	279	3,069
			30,479	3,048	33,527

Bid "G"—Total for 448,860 lbs. iron in place

Defendant's Exhibit "W 2."

[840]

Bull Run.

Copy of Catt's Estimate on Plant

For 20 sections 30 ft. long—120 sheets per day.

4 punches	8,000
2 Planers	3,000
2 Bending Rolls (each bend 6 plates per hour)	3,000
12 Yale and Towne Cranes	3,000
3 Riveters complete with Pumps, cranes, etc. (to run night and day)	16,000
2 Forges	100
1 Small Punch and Shear	1,500
1 Drill Press	200
1 Lathe	200
Shafting	1,000
Car Track and Overhead Tramway	1,200
Engine	2,000
Boilers	3,000
Electric Light	1,000
Incidentals	1,000
	<hr/>
	44,200
Transportation to Portland	5,000
Dipping plant	3,000
Hoisting Engine for same	5,000
Shop Buildings	10,000
	<hr/>
	67,200

[841] N. B. This estimate includes nothing for setting up machinery, preparing foundations for same, etc. The estimate for shop building is, however, too high, about high enough to cover this. The estimate for riveters is too high, as these riveters are designed to drive $\frac{3}{4}$ in. and 1 in. steel rivets and special riveters for this work (7-16 in. and $\frac{1}{2}$ in iron rivets) can be made for one-half cost of above.

H. D. B.

Bull Run.

W.2 p.2

Catt's Estimate of Cost of Riveted Pipe, 20 sections
—about 50,000 lbs. per day.

	Per day
Total men to operate tools, to deliver the pipe ready for calking, 60 @ \$2.50 per day average	150.00
Coal and Oil	25.00
Rivets for 50,000 lbs. plates—excess of	
Cost of rivets over price paid for finished pipe	60.00
Engineer and fireman	15.00
Shops, Superintendents and Supplies per day	50.00
Making a total per day of	300.00
	per pound
\$300 per day for 50,000 lbs.—per pound for pipe ready for calking .....	.006
Calking .....	.0005
Dipping and Testing .....	.0015
Contribution toward cost of plant	\$36000.00 .003
[842] Superintendence and incidentals	\$18000.00 .0045
Making a total of .....	.0125
Riveting on field .....	.002
Hauling .....	.0025
Profits	\$80500.00 .007
Or bid for pipe in the ditch .....	.024
We did bid .....	.0275
N. B. 50,000 lbs. per day would be about 600 tons per month, requiring 10 months to manufacture pipe. Catt has \$50 per day for superintendence and incidentals in one place 250 days @ 50	12500
For the same in another place	18000

30,500

But he is too low on field work, allowing only 2/10c. or \$4.00
per ton for *all* the work in the field.

Reduced to tons his estimate is as follows:

Shop Work—1 1-4c. per lb.	\$25.00 per ton
Hauling 1-4c. per lb.	5.00 “ “
Field Work 2-10c. per. lb.	4.00 “ “
	<hr/>
	\$34.00 “ “

Julia E. Hoffman, Executrix, etc.

591

Profit 7-10c. per lb. 14.00 " "

Bid \$48.00 " "

We bid \$55.00.

H. D. B.

[843]

Bull Run Pipe Line. W2, page 3

Copy of Catt's Estimate for Manufacture and Laying.

As compared with actual bid.

	Catt's Prices	Estimate Amounts	Prices Bid.	
Plates 11442000 lbs.				
Rivets 340000				005
Manuf. and laying 11782000				
lbs. @	\$.024..	\$282768.00	.0275	324060
Manholes 255 @	30.000..	7560.00	\$20.	4500
Air Valves 34 @	10.000..	340.00	8.	432
Bends, Extra Joints, 200 @	20.000..	4000.00	30.	6000
Blow-offs with 6" valves 46	10.000 ..	460.00	20.	920
Waste Pipes 6" 29,000 lbs..	.060..	1740.00	.10	2900
Brick laid in cement 580 M ..	16.00 ..	9280.00	21.	12180

Two Stand Pipes.

Plates	15,000 lbs.	.060..	900.00	.08	1200
Water Gates 36"	1	75.000..	75.00	500.	500
Water Gates 33"	1	75.000..	75.00	500.	500
Water Gates 30"	2	75.000..	150.00	350.	700
Waste Pipe 30" ..	40000 lbs.	.060..	2400.00	.07	2800
Foundat'n Concrete 60 yds.	12.000..	720.00	10.		600

Sleeve Joints.

Wr't Iron—7	7000 lbs.	.100..	700.00	.07	490
[844] Lead	3000 lbs.	.060..	180.00	.06	180

Trestles.

W'r't Iron.....	40000 lbs.	.060..	2400.00	.064	2560
Concrete	400 yds.	12.00	4800.00	8.	3200

Total without Excavation.....	318638.00				363722
					667

Excavation and Refilling.

Earth.....	270000 yds.	.33 1-3	90000.00	.30	81000
Loose Rock ...	10000 yds.	.500 ..	5000.00	1.50	15000
Solid Rock. ...	2000 yds.	1.200 ..	2400.00	3.00	6000

	97400.00				102000
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Grand Total.....	\$416038.00				465722
					667

Defendant's Exhibit "Y 2."

[45]

BID "D.D.D."

G.A.B. Ex.

Manufacturing and Laying.

28	{Steel, 11,442,000 } {Rivets 340,000}	11,782,000	\$.024	\$282,768.00	
29	Manholes.....	255	30.00	7,650.00	
30	Air Valves.....	34	10.00	340.00	
31	Bends, extra joints..	200	20.00	4,000.00	
32	Blow-offs, with 6-inch valves.....	46	10.00	460.00	
33	Waste Pipes, 6-inch.	29,000	.06	1,740.00	
33 1/2	Brick laid in cement	580,000	16.00	9,280.00	\$306,238.00
34	Steel Plates.....	15,000	.06	900.00	
35	Water Valves, 36-in.	1	75.00	75.00	
36	Water Valves, 33-in.	1	75.00	75.00	
37	Water Valves, 30-in.	2	75.00	150.00	
38	Waste Pipe, 30-in...	40,000	.06	2,400.00	

Julia E. Hoffman, Executrix, etc.

39 Foundations—

	Concrete or cement	.80	12.00	720.00	4,320.00
40	Wrt. iron sleeves...	7,000	.10	700.00	
41	Lead.....	3,000	.06	180.00	880.00
42	Wrought iron.....	40,000	.06	2,400.00	
43	Foundat'ns, concrete	400	12.00	4,800.00	7,200.00
44	Earth.....	270,000	.33½	90,000.00	
45	Loose Rock.....	10,000	.50	5,000.00	
46	Solid Rock.....	2,000	1.20	2,400.00	97,400.00
Total cost Bid "D.D.D."					\$416,038.00

Clerk's Certificate to Transcript.

[846]

District of Oregon, ss.

I, J. A. Sladen, clerk of the Circuit Court of the United States for the District of Oregon, do hereby certify that the foregoing transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in cause No. 2204, John McMullen v. Julia E. Hoffman, executrix of the last will of Lee Hoffman, deceased, the said transcript comprising volume one, containing the pleadings and depositions, volume two, containing the testimony taken before George A. Brodie, examiner, and volume three containing exhibits to the said testimony is a correct transcript of the said record and of the whole thereof, except the parts of the said record which are omitted by stipulation of the parties to this cause, as the same appears at my office and in my custody.

I further certify that the cost of the foregoing transcript, on the appeal of Julia E. Hoffman, executrix, is three hundred and ten and 50-100 dollars, and that the same has been paid by said appellant; and the cost of the transcript on the appeal of John McMullen is nine and 20-100 dollars, and that the same has been paid by said John McMullen, appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court at Portland, in said District, this 9th day of October, 1896.

[Seal]

J. A. SLADEN,
Clerk.

7] [Endorsed]: No. 334. In the United States Circuit Court of Appeals for the Ninth Circuit. Julia E. Hoffman, Executrix of the Last Will of Lee Hoffman, Deceased, Appellant, vs. John McMullen. John McMullen, Appellant, vs. Julia E. Hoffman, Executrix of the Last Will of Lee Hoffman, Deceased. Transcript of Record. Appeal from the Circuit Court of the United States for the District of Oregon.

Filed October 14, 1896.

F. D. MONCKTON,
Clerk.

[848] *In the United States Circuit Court of Appeals, for the Ninth Circuit.*

JULIA E. HOFFMAN, Executrix of the
Last Will of Lee Hoffman, Deceased,
Appellant,
vs.
JOHN McMULLEN,
Appellee.

Opinion.

Appeal from the Circuit Court of the United States for the District of Oregon.

Dolph, Mallory & Simon, for appellant.

Cox, Cotton, Teal & Minor and I. Percy Wright, for appellee

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity brought by John McMullen (plaintiff) against Lee Hoffman (defendant) for an accounting for the profits earned on a contract to construct a pipe line by which the city of Portland is supplied with water. Pending the suit, Lee Hoffman died, and the suit was revived against Julia E. Hoffman, executrix of the last will and testament of Lee Hoffman, deceased. The water committee representing the city of Portland having advertised for bids to construct the line, the original parties hereto entered into an agreement by which the defendant, Hoffman, bid for the work, in the name of Hoffman & Bates. The plaintiff, McMullen, with the knowledge and concurrence of the defendant, made a separate bid in the name of the San Francisco Bridge Company, a company controlled by him. This bid was some \$49,000 higher than the bid of the defendant. The contract having been awarded to the defendant, a written agreement of partnership was entered into by the parties for the

49] execution of the contract to be entered into by the defendant with the city, which agreement reads as follows:

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That whereas, said Hoffman and Bates have, with the assistance of said McMullen, at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expects to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman & Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one-half of the expense of executing the same, and each to receive one-half of the profits, or bear and pay one-half of the losses, which shall result therefrom. And it is further hereby agreed that, if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike."

The contract awarded on defendant's bid was formally entered into by the water committee, of the one part, and by the defendant, in the name of Hoffman & Bates, of the other. The contract proved a profitable one, the profits thereunder amounting to nearly \$140,000. Hoffman refused to account to McMullen for any part of these profits, upon the ground that the bids made by them tended, under the circumstances, to lessen competition, and operated as a fraud upon the city, and could not be enforced in equity, and upon the further ground that McMullen wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement, to share the earnings of the contract with the complainant, was made.

The whole transaction grows out of the enterprise undertaken by the city of Portland to conduct the water of Bull Run river some 30 miles to the city. The water was to be conveyed through steel pipes, and had to be conducted across streams

which required the construction of bridges, and expensive and permanent works had to be erected at Bull Run river, where the water was diverted from the river to the pipe. The construction of this work was placed by the legislature in the hands of a committee composed of 15 persons, who managed the business for the city. This committee decided to let this work at a public letting to the lowest bidder, and to that end the work was divided into the following general classes: (1) Head works; (2) bridges; (3) wrought-iron plates; (4) steel; (5) manufacturing and laying wrought-iron or steel pipes from head works to Mt. Tabor; (6) steel plates for pipe; (7) conduits from head works to Mt. Tabor, cast iron; (8) cast-iron pipe for Mt. Tabor City Park; (9) submerged pipes,—and separate bids invited for each. The letting was the ordinary public letting upon sealed proposals. Hoffman and McMullen each undertook to secure contracts to do this work, or some portion of it, by bidding for it, in response to the invitation of the water committee. Bids for each of the following items were accordingly submitted by them to the water committee, Hoffman bidding in the name of Hoffman & Bates, and McMullen bidding in the name of the San Francisco Bridge Company: Head works: Hoffman & Bates, \$17,800; San Francisco Bridge Company, \$16,550. Bridges: Hoffman & Bates, \$33,562.94; San Francisco Bridge Company, \$31,993. Steel conduit from head works to Mt. Tabor: Hoffman & Bates, \$359,278; San Francisco Bridge Company, \$348,781. Conduit from head works to Mt. Tabor of steel or wrought iron, making and laying pipe: Hoffman & Bates, \$465,722; San Francisco Bridge Company, \$514,775. McMullen submitted a bid in the name of the San Francisco Bridge Company for the submerged pipe of \$79,740. For this work Hoffman did not bid. They agreed in advance upon what parts of the work they should bid, upon what their respective bids should be, and upon what portion the bid of the San Francisco Bridge Company should be cheapest. There was also an understanding between them, as to some portions of the work, that the lowest bid should be withdrawn in the event that there were no other outside bids lower than Hoffman & Bates. In other words, they were to pool their bids, and so arrange matters that the highest bid, as between themselves, should, if possible, be accepted, and they would divide the proceeds of the contract. Suggestions were freely made

[852] as to the propriety of taking in other bidders, and also the secretary of the committee, so that honest bids might be withheld and others ascertained, by fraudulent and improper means. The following extract from a letter written by McMullen to Hoffman fairly illustrates the means they proposed to use to accomplish the object they had in view:

"I do not want to let go on that submerged pipe; want to get the job. I think we can make \$25,000 on that job, but we must pool it. To do this, we will have to let the secretary, Frank T. Dodge, in, and, if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened; and we will gather in everybody that is personally represented. Don't think there is many."

The Circuit Court, upon final hearing, rendered a decree in favor of McMullen for \$52,519.80, and one-half of the assets, consisting of plant and tools, furniture, and camp fixtures, of the cost value of \$7,856.76, and a disallowed claim against the city of Portland for \$16,961.25. From this decree Hoffman appeals. There is also a cross appeal taken by McMullen from the decree of the Court allowing Hoffman a salary of \$1,000 per month, and from the refusal of the court to allow him interest on the money found due, and refusal to allow him costs. The appeal of Hoffman will first be considered.

The contention of appellant is that the manner in which the parties hereto presented their bids, and sought thereby to procure contracts from the committee, was illegal. It is not seriously denied but what the city of Portland could have success-
[863] fully defended any action that might have been brought against it by the contractors, Hoffman & Bates, upon the ground that the contract was secured by illegal means. It did not do so. It paid the money to Hoffman. The question here presented is: Can the defendant avail himself of this defense? The authorities answer this question in the affirmative. It is true that the objection that a contract was immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. But it is not for his sake that the objection is ever allowed. The refusal of courts to enforce such contracts is always founded in general principles of public policy, which the defendant may take the advantage of, contrary to the real justice of the case, as between the parties

plaintiff and defendant. It is the duty of all Courts to keep their eye steadily upon the interests of the public and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance in foro civili.

In dealing with illegal contracts, Courts do not and cannot look alone to those who are parties to the illegal transaction. The law regards the welfare of society as paramount, and, in enforcing the law, courts will not impair its efficacy or cripple its operations by considerations affecting the interests of those who are *particeps criminis*. The principle of public policy is this: "*Ex dolo malo non oritur actio.*" No Court will lend its aid to a man who founds his cause of action upon im-

[854] moral or illegal acts. If, from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa* or a transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground that the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was bringing his action against the plaintiff, the latter would have the advantage of it; for, where both are equally at fault, *potior est conditio defendentis*. (*Bartle v. Coleman*, 4 Pet. 184, 189; *Tool Co. v. Norris*, 2 Wall. 45, 54; *McCausland v. Ralston*, 12 Nev. 195, 206, et seq., and authorities there cited; *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 418, 427, 3 Fed. 1; *Buck v. Albee*, 26 Vt. 184; *Hannah v. Fife*, 27 Mich. 172, 181; *Wooden v. Shotwell*, 23 N. J. Law, 465; *Price v. Polluck*, 37 N. J. Law, 44; *Belding v. Pitken*, 2 Caines, 147; *Leonard v. Poole*, 114 N. Y. 271, 379, 21 N. E. 707; *Hope v. Association* (N. J. Err. & App.) 34 Atl. 1070.)

In *Bartle v. Coleman* the Court said:

[855] "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other or to

equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws."

A contract to prevent competition and bidding for public work is contrary to public policy, and cannot be enforced. The rule is universal that agreements which, in their necessary operation upon the action of the parties, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principle of sound public policy, and are void. (*Gulick v. Ward*, 10 N. J. Law, 87, 91; *Swan v. Chorpennig*, 20 Cal. 182, 185; *Hannah v. Fife*, 27 Mich. 172, 180; *Weld v. Lancaster*, 56 Me. 453, 457; *Noyes v. Day*, 14 Vt. 384; *Gibbs v. Smith*, 115 Mass. 592; *Doolin v. Ward*, 6 Johns, 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *Kelly v. Devlin*, 58 How. Prac. 487; *Atcheson v. Mallon*, 43 N. Y. 147; *Hunter v. Pfeiffer*, 108 Ind. 197, 200, 9 N. E. 124; *King v. Winants*, 71 N. C. 469, 474; *Durfee v. Moran*, 57 Mo. 374, 379; *Lawnin v. Bradley*, 13 Mo. App. 361; *Engelman v. Skrainka*, 14 Mo. App. 438; *Woodruff v. Berry*, 40 Ark. 252, 267; *Hyer v. Traction Co.*, 80 Fed. 839, 844.) Do the facts and circumstances of this case bring it within this general rule? Can this case, consistently (356) with the reasoning of the authorities, be excepted from it? Does it infringe in any manner upon any principle of public policy? It is argued by appellee that the bidding was not illegal, because the proof shows that McMullen and Hoffman were jointly interested in the bid, and that the law allows two or more persons to combine together for the purpose of making one bid. This is true where no fraudulent purpose is involved. An honest co-operation between two or more persons to accomplish an object which neither could gain if acting alone in his individual capacity is not within the rule, although, in a certain sense and to a limited degree, such co-operation might have a tendency to lessen competition. There may be a competition that saves as well as a competition that kills. The amount of work to be performed, the necessity of obtaining means to properly carry on the contract, the responsibility of the parties, their ability to complete the work, etc., are matters which are liable to make it absolutely necessary for rival contractors to combine their forces and unite together not only in order to secure the contract, but to enable them, if it is obtained, to complete it without financial embarrass-

ments or other difficulties which are liable to arise in cases of individual responsibility. There is no valid objection to such voluntary combinations if the joint action of the parties is done honestly and in good faith. In all contracts secured in such a manner the Courts should never hesitate to protect parties in their agreements with each other, and compel them to [857] comply with the terms thereof. It is only where the facts and circumstances surrounding the case clearly show that illegal means or improper and deceptive influences and methods were used to procure the contract that the maxim, "*in pari delicto*," applies.

In *Atcheson v. Mallon*, 43 N. Y. 147, 151, the court said:

"A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk as well as the profit is joint and openly assumed. The public may obtain, at least, the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

In *Gibbs v. Smith*, 115 Mass. 592, the Court, in drawing the line of distinction in an analogous case, said:

"An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together, or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character, and will be enforced; but such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy, and in fraud of the just rights of the parties offering it, and therefore illegal."

See, also, *Lawnin v. Bradley*, *supra*; *Cocks v. Izard*, 7 Wall. [858] 559.

The fraud, if any, in the present case was in withholding the truth—in fraudulently representing and holding themselves out to the committee and to the public as rival bidders, when

in fact they were not. The learned Judge who tried this case, in his opinion upon the exceptions to the defendant's answer, said:

"When the parties presented themselves as competitors for the work, they were guilty of a fraud. The tendency of what was thus done was to cause the water committee to believe that the bid of defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee that, in plaintiff's opinion, the work could not be profitably done for less than a figure \$35,000 higher than that bid by defendant, although, as a matter of fact, plaintiff believed such work could be done, and, except for the collusive agreement with defendant, would have offered to do it, for an amount \$75,000 less than that at which the contract was let. Upon all the cases cited or to be found, and in any view of the case consistent with public policy and the principles of equity, there can be no relief in such a case." *McMullen v. Hoffman*, 69 Fed. 509, 518.)

Upon the final hearing, he came to the conclusion that his former opinion was erroneous, and held that the contract and
[359] agreement of the parties were valid as between themselves. (*McMullen v. Hoffman*, 75 Fed. 547.)

This case, in principle, cannot, in our opinion, be distinguished from *Atcheson v. Mallon*, *supra*, although the facts here as to the illegal character of the transaction are much stronger than in that case. There the parties simply showed each other their bids, and agreed to divide the profits. Mallon was the lowest bidder, and obtained the contract. The money due on the contract when completed was paid to him. The profits amounted to \$400. Mallon refused to divide. Atcheson brought suit to recover his share of the profits. The Court refused to enforce the contract. After announcing the general rule which we have stated, and declaring the general principles applicable thereto, the court said:

"If Mallon had promised Atcheson a sum of money if he would refrain from making any proposal, and Atcheson, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any consideration for the parties to it, but because its effect was to remove

Atcheson from the number of earnest bidders, and thus, by lessening competition, to detriment the public. And the agreement which was made, laying open to Mallon just what was the judgment of Atcheson of a profitable bid, and removing, in effect, an interested rival, tended to affect Mallon's action; while Atcheson, confident that, if Mallon succeeded, it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce."

[860] Nor can this case be distinguished in principle from *Swan v. Chorpennig*, supra. In that case both parties to the agreement were mail contractors. Swan put in a bid for carrying the mail over a certain route, and agreed with C. to withdraw his bid, and use his influence to induce the government to give to C. a contract for a longer route, including the one bid upon, on consideration that, if C. obtained the contract, S. should have an interest in it, or be paid an equivalent pecuniary compensation. Chorpennig obtained the contract, and, after payment to him, refused to divide the profits. The Court, after quoting *Gulick v. Ward*, said:

"We see no difference in principle between the question in that case and the one now presented, and the cases clearly fall within the same category. In respect to the consideration, it is impossible to distinguish them; for an agreement not to bid and an agreement to withdraw a bid already put in are certainly obnoxious to the same legal objections."

Now, the agreement in the present case was substantially to the same effect. In consideration of sharing in the profits, McMullen did not put in an honest bid. He put in a bid much higher than he would otherwise have done but for the agreement. His object, evidently, was to deceive the committee—to convey the idea that he was a rival bidder, when in fact he was not. Such conduct certainly tended to destroy competition, and to preclude the advantages which inevitably resulted from it. Equally strong in its similarity as to the effect of the agreement between the bidders is the case of *Hannah v. Fife*. [861] That was an action brought by Fife and Haviland against the plaintiff in error, as the sureties of one Oscar L. Noble in a contract between said Noble and Fife and Haviland, by which

Noble agreed to enter into and perform a contract with the state for the construction of a swamp land state road, for the building of which said Fife and Haviland had been the lowest bidders, and to give them, as a bonus for being allowed to take their place in the contract, eight sections of swamp lands to be received from the state for the performance of the work. Noble's bid, in the first instance, was in reality less than the bid of Fife and Haviland, but it was not made out in accordance with the plan submitted by the state, and could not be accepted. The bidders obtained a continuance and, before the bid was let, the agreement in question was made, and Noble got the contract. The Court in the discussion of the case, said:

"Now, if these bidders, Noble, on one side, and Fife and Haviland on the other, had, before or at the time of making their respective bids, entered into a secret agreement, for their mutual profit and to avoid competition with each other, that, for the purpose of getting a contract from the state for building this road at the highest rate or greatest quantity of land allowed by the law, only one of the parties should put in a bid, which in its terms would accord with the plan of the road adopted by the state, and with the notice given, while the other, though not in accordance with that plan or notice, should in all other respects appear to be in accordance with the terms proposed by the state, and better in some respects than the bid of the other, but which, nevertheless, could not be accepted, because not in accordance with the plan (thus securing in advance the letting of the contract to one of the parties without danger of competition from the other, while keeping up the appearance of competition); and that the contract should be performed by one of the parties for the mutual profit of both; or that the party taking the contract and doing the work should give to the other as his share of profit, eight sections or any other portion of the land to be received from the state—if such had been the previous arrangement between the parties, it will not be pretended that such an understanding or any agreement resting upon it or calculated to carry it into effect, could have been sustained. It would have been so manifestly fraudulent, as against the state, and so subversive

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of the intentions and objects of the legislation, that no court could hesitate for a moment to declare it illegal and void."

There was no evidence in that case except such as could be legally drawn from the facts that there was any such previous agreement. But the Court said it was difficult to resist the conclusion that the facts as proved tended "pretty strongly to show the existence of some such previous understanding," and that the putting in the bid "by Noble in a mode which, under the notice, could not have been accepted, is not, when considered with reference to the subsequent acts of the parties, easily explained upon any other rational theory than that of previous concert for the purpose already intimated." The Court further said:

"But whether there was, in fact, any such secret understanding or fraudulent collusion between the bidders or not, is, in my opinion, entirely immaterial to the decision in the present case. It seems to me clear that the tendency of all such contracts between bidders as that here in question, if recognized as valid by the courts, must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder."

[863] In the present case it is evident that McMullen and Hoffman understood each other; that their intention was to prevent open competition, which the law encourages. In their confederacy they were aiming at the same result—that of compelling the city to pay a higher price for the work than McMullen believed it was worth.

Breslin v. Brown, 24 Ohio St. 565, 570, is perhaps the strongest case presented in favor of appellee herein as to the right of parties who had intended to bid, and did bid, upon public improvements that were to be let to the lowest bidder, to enter into an agreement to become partners in the work in the event that the contract should be awarded to either, and that the contract, when awarded, should inure to the benefit of the firm. But that case, in its facts, is clearly distinguishable from the case at bar in many of its essential particulars. There, separate and independent bids were filed by the respective parties.

"The bid of each was based upon his own judgment and filed at his own discretion." It did not appear that either had knowledge of the other's bid, and these facts led the Court to the conclusion that the agreement made between the parties, and the result of the bidding, did not have a tendency to stifle competition at the letting of the bid. Here the parties agreed in advance as to what their bids were to be. Each knew what the bid of the other was. The intent, object, and tendency of their co-operation in the contract, as is fully and clearly shown by the testimony, was to deceive the committee, and commit a fraud upon the public.

864] In *Hunter v. Pfeiffer* the appellant and the appellee were about to bid for the construction of a public work, but the appellant was induced to withhold his bid in consideration that he should be taken into partnership, and be permitted to share in the profits of any contract which appellee might secure. The Court said:

"Upon all such partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of the profits anticipated or accrued. . . . If the Court should lend any countenance to such a contract of partnership as that disclosed in the complaint, in either aspect in which it is present, the effect would be to afford facilities for bidders to enter into secret agreements and combinations with each other, and thus enable them to defeat the plain purpose of the legislature in requiring such contracts to be let to the lowest and best bidder."

At the close of the opinion the Court said:

"If, in letting a contract such as this, parties, without knowledge of the bids of each other, submit their bids as the law requires, and afterwards enter into a partnership for the construction of the work with the knowledge of the officers letting the same, a question of a different character is presented. Such a transaction bears some similitude to the contract which 865] was upheld in *Breslin v. Brown*, 24 Ohio St. 565, a case which, on account of the liberal view taken of the contract there involved, is not universally indorsed. That case, however, affords no aid to the appellant here."

The cases are too numerous to be specifically reviewed. The dividing line is always sharply drawn with reference to the

particular facts of each case, and the conclusion reached that where the parties have acted openly and honestly, and entered into an agreement which neither in its purpose, effect, nor natural tendency is to prevent a fair competition, it can be and should be enforced. But, where there is a secret combination—call it partnership or any other name—the effect of which is, or the natural tendency of which is, to abate honest rivalry or prevent fair competition, it is to be and is condemned, as violative of public policy, and held to be absolutely void. All the authorities hold that, where either the intention, the effect, or the necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy, and, when discovered, will be stamped with marks of disapproval in any court of law or of equity. Were any of the subsequent acts of the parties, or the condition of the contract as to its completion, or any other fact or circumstance established at the trial, of such a character as to take this case out of or away from the general rule hereinbefore stated in relation to illegal contracts?

[866] It is claimed that, before the money was paid by the city, it had knowledge of the true relations existing between McMullen and Hoffman, and, with such knowledge, accepted the work, and paid the contract price therefor, and that the city was not in any manner injured by the illegal acts of the plaintiff and defendant herein. But the law is well settled that the question of the validity of the contract does not depend upon the circumstances whether the public has, in fact, suffered any detriment, but whether the contract is in its nature such as might have been injurious to the public. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose they must have contemplated when it was made. Its validity is tested, not by its results, but by its objects, as shown by its terms. In addition to the authorities heretofore cited, see *Gibbs v. Smith*, 115 Mass. 592; *Atcheson v. Mallon*, 43 N. Y. 147, 149; *Woodworth v. Bennett*, 43 N. Y. 273, 278; *Weld v. Lancaster*, 56 Me. 453, 457; *Richardson v. Crandall*, 48 N. Y. 348, 362. It is not therefore necessary, in the determination of this case, to inquire whether the effect of the agreement between the parties was in fact detrimental or beneficial to the city of Portland.

Appellee argues that the case as presented comes within the rule, so frequently announced in the authorities, that a contract or an agreement will be enforced, even if it is incidentally or indirectly connected with an illegal transaction, provided it is supported by an independent consideration, so that the plaintiff will not require the aid of the illegal transaction to make out his case. This principle is undisputed. (*Armstrong v. Bank*, 133 U. S. 434, 469, 10 Sup. Ct. 450, and authorities there cited. See, also, *Woodworth v. Bennett*, 43 N. Y. 273; *Buck v. Albee*, 26 Vt. 184; *Gilliam v. Brown*, 43 Miss. 642, 660; *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 558, 562, 3 Fed. 423; *Swan v. Scott*, 11 Serg. & R. 155; *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 208.) This argument, with the authorities cited in its support, will be considered in connection with the further contention of appellee that the case, upon its facts, comes within the general principle that, after the illegal contract has been fully executed, one party, in possession of all the gains and profits resulting from the illicit traffic and transaction, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law. (*McBlair v. Gibbs*, 17 How. 232, 237; *Railroad Co. v. Durant*, 95 U. S. 576, 578; *Sharp v. Taylor*, 22 Eng. Ch. 801, 817; *Gilliam v. Brown*, 43 Miss. 642, 664; *Lestapies v. Ingraham*, 5 Pa. St. 71, 81; *Hipple v. Rice*, 28 Pa. St. 406; *Willson v. Owen*, 30 Mich. 474; *Richardson v. Welch*, 47 Mich. 309, 11 N. W. 172; *Wann v. Kelly*, 2 McCrary, 628, 630, 5 Fed. 584; *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russel*, Id. 296; *Thomson v. Thomson*, 7 Ves. 470; *Owen v. Davis*, 1 Bailey, 315.) There are certain underlying principles—clear and well defined—which govern and control the propositions announced in these authorities; and, from a careful consideration thereof, it can readily be ascertained whether they have or have not any binding force in their application to the facts of this case.

Armstrong v. Bank, supra, may be taken as a representative case under the first proposition. *Armstrong* was the receiver of the Fidelity National Bank of Cincinnati, Ohio. The facts were that on June 14, 1887, the Fidelity National Bank of Cincinnati drew a draft for \$100,000 on the Chemical National Bank of New York City, payable to the order of the American Exchange National Bank of Chicago, and put it into the hands of one W., who delivered it, for value, to K. & Co. They

indorsed it for deposit to their account to the Chicago bank, which credited the amount to them, and paid their checks against it. The Court held that W. did not act as the agent of the Cincinnati bank, and that in a suit by the Chicago bank against the receiver of the Cincinnati bank, which had failed, to recover the amount of the draft, the Chicago bank was a bona fide holder of it for value, and want of consideration could not be shown by the receiver. One defense set up to the suit on the certificate of deposit was that H. (the vice president of the Cincinnati bank), its assistant cashier, and W., of W. & Co., conspired to defraud that bank by using its funds in speculating in wheat in Chicago, through K. & Co., so as to make a "corner" in wheat. The Court held that the plaintiff could not refuse to honor the checks of K. & Co. against the deposit, on the ground that K. & Co. intended to use the money to pay antecedent losses in the gambling wheat transactions; that where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. It was these facts and rulings of the Court that led up to the announcement of the legal principles under consideration. In the discussion of that case the Court said:

"When the plaintiff received the deposit from Kershaw & Co., it was bound to honor their checks against it; and it could not refuse to pay them on the ground that Kershaw & Co. intended to make an improper use of the money. If Wilshire, Eckert & Co. and Kershaw & Co. were engaged in gambling, and the former had deposited money in the Fidelity Bank to be transferred to the plaintiff, in order that Kershaw & Co. might check out the amount from the plaintiff's bank in payment of losses sustained in the gambling transaction, and both banks knew that the money was to be so used, still the Fidelity Bank, having received the deposit, could not refuse to pay it over to the plaintiff, and the plaintiff, having received it, could not refuse to honor the checks of Kershaw & Co. drawn against it."

The Armstrong Case is in line with the early English cases of *Tenant v. Elliott*, *Farmer v. Russell*, *Sharp v. Taylor*, and others heretofore cited, to the effect that A., having received money to the use of B. on an illegal contract between B. and

870] C., shall not be allowed to set up the illegality of the contract as a defense in an action brought by B. for money had and received. The principle of these cases cannot be questioned. But a bare statement of the facts upon which the principles were there applied shows, beyond question, that the facts of the present case are not, and cannot be brought, within the rule there announced. This case belongs to a different class. The distinction between the class of cases is clearly set forth in *Thomson v. Thomson*, *supra*. The master of the rolls, after declaring that the agreement there under consideration was illegal, said:

"There is an equity against the fund, I admit, if you can get at it by a legal agreement. The defense is very dishonest, but in all illegal contracts it is against good faith as between the individuals to take advantage of that. A man procures smuggled goods, and keeps them, but refuses to pay for them. So, in the underwriter's case, an insurance contrary to the act of parliament, the brokers had received the money, and refused to pay it over; and it could not be recovered. No matter who complains of it, the thing is illegal. You have no claim to this money except through the medium of an illegal agreement, which, according to the determinations, you cannot support. I should have no difficulty in following the fund, provided you could recover against the party himself. If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing his trust. *Tenant v. Elliott* is, I think, an authority for that. But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then, how are you to get at it except through this agreement? There is nothing collateral, in respect of which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences. Here you cannot stir a step but through the illegal agreement; and it is impossible for the court to enforce it."

871] *Brooks v. Martin*, 2 Wall. 70, is relied upon by appellee to show that the contract and agreement between the parties had been fully executed and completed. There the parties were partners in buying up soldiers' claims, contrary to law. When

the suit was brought, all the claims of the soldiers illegally purchased by the partnership, with money advanced by the complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had in many cases been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the land so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were, then, in the hands of the defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It was to have an account of these funds, and a division of these proceeds, that the suit was brought. Upon this statement of the facts the Court said:

"Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute enacted for the benefit of the soldier is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It [872] interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the Court in this case."

In support of these views, the Court quotes in extenso from *Sharp v. Taylor*, *supra*, which closed with the statement that "the difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant v. Elliott* and *Farmer v. Russell*, and recognized and approved by Sir William Grant in *Thomson v. Thomson*"; thus clearly indicating the class of cases to which the case then under consideration belongs. The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover

is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, then he is entitled to recover.

873] The doctrine of *Brooks v. Martin* and kindred cases is, and always should be, applied in cases where the fraud complained of is between individuals, which does not in any manner affect the public interest. If McMullen and Hoffman had agreed to continue their partnership, by investing the profits received by Hoffman under the illegal contract in the purchase of property, mortgages, bonds, or other securities, neither of them would be permitted, as against the other, to set up the fact that the money so invested was derived as profits from an illegal transaction, in which the rights of the public were involved. Numerous instances are found in the books which present the distinction existing between the two lines of cases under consideration in a very clear light.

In *King v. Winants*, the Court, in reviewing the principles announced in *Brooks v. Martin*, 2 Wall. 70, said:

"Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler, the other rifles his pocket of \$1,000, and then refuses to divide; and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the ren-counter and the treachery. Will a Court of justice hear them? No case can be found where a Court has allowed itself to be so abused. Now, if these robbers had taken the \$1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the Court to settle up that legitimate business, the Court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks v. Martin*, *supra*, so much relied on by plaintiff."

- [874] The learned counsel for appellee, recognizing the force of the reasoning of the authorities, admits, for the purpose of his argument, that if, after the award was made to Hoffman, he had refused to enter into the partnership arrangement, McMullen could not have compelled him so to do, nor collect any damages for his refusal, "because the grounds then existing as the basis of appellee's claim would have been that he had rendered service in securing the award, and, necessarily counting upon that service, he would have had to bring it into the court, and its character would have been a subject for investigation. But, when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead letter." If this position could be maintained it would furnish a very convenient way for escaping the penalty which the law imposes upon all persons who have secured contracts in an illegal and unlawful manner. A contract secured by corrupt means—the bribing of public officers, buying off all rival bidders, thus stifling all competition where contracts are to be let to the lowest bidder—could always be enforced by a simple agreement of partnership by parties guilty of the fraud. The fraud, under this rule, is a thing of the past—has become "a dead letter," or is made honest by a single stroke of the pen, creating a new agreement to share and share alike in performing the illegal contract. What would there be left to discourage parties in their illegal combinations to defeat the ends of justice if this rule should be adopted and enforced by the Court? The illegality of the contract could always be avoided as between the parties to the partnership agreement. We prefer to tread in the beaten path; to follow the safe road which has al-
- [875] ways been kept clean, in good condition and order, and furnishes a safe method of protection to the public who honestly travel thereon, and provides a penalty to all parties who depart therefrom by crooked ways, which naturally lead and always tend to destroy the public interests. It is manifest to every layman and lawyer, as well as to the courts, that such agreements would destroy all competition in the letting of contracts for public works. In the language of the authorities, such agreements are always declared void. Why? Because men with these agreements in their hands, and relying upon them for gain, do not act towards the public and third

persons as they would without them, under the stimulus of a competing opposition.

This suit is brought for an accounting between the parties of the profits realized on the contract made with the committee for the city of Portland upon its award to Hoffman & Bates upon the bid of Hoffman. The foundation of the case rests upon the legality of that contract. The case could not be proven without first showing the contract, and then proving the amount of money received and expended thereon. If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. (*Hanks v. Baber*, 53 Ill. 292; *Chace v. Trafford*, 116 Mass. 532; 1 Am. & Eng. Enc. Law (2d Ed.) 437.) But it does not appear that any such admission has been made. No promise has been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought. This suit, as before stated, [376] is for an accounting, and the amount found due in the Circuit Court was only ascertained, and could only be determined, by an investigation of the transaction between McMullen and Hoffman arising out of the contract with the committee. The relief prayed for required the Court to investigate all of the various transactions of the parties from the beginning to the end, and adjust the differences between them. We are called upon to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils, and to help them make a just and equitable division. This is just what the courts in all cases of illegal contracts, agreements, or enterprises have universally refused to do. The act of Hoffman in refusing to divide the profits cannot be too strongly condemned. But it has often been said that courts are not organized to enforce the saying that there is honor among wrongdoers, and the desire to punish the man that fails to observe this rule must not lead the court to a decision that such persons are entitled to the aid of Courts to adjust their differences arising out of, and requiring an investigation of, their illegal transactions.

The conclusions reached upon this branch of the case render it unnecessary to consider the question argued by counsel as

to whether or not the partnership between Hoffman and McMullen was dissolved long prior to the completion of the contract, or to examine any of the questions presented in the cross appeal by McMullen against Hoffman. The views herein expressed are decisive of the whole case. The judgment and decree of the Circuit Court are reversed.

[Endorsed]: Opinion. Filed Oct. 4, 1897. F. D. Monckton, Clerk.

[877] *United States Circuit Court of Appeals, for the Ninth Circuit.*

No. 334. October Term, 1897.

JULIA E. HOFFMAN, Executrix, etc.

Appellant,

vs.

JOHN McMULLEN,

Appellee.

JOHN McMULLEN,

Appellant.

vs.

JULIA E. HOFFMAN, Executrix, etc.

Appellee.

Decree.

Appeal from the Circuit Court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Oregon, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said Circuit Court, in this cause be, and the same is hereby, reversed, with costs.

[Endorsed]: Decree. Filed Oct. 4, 1897. F. D. Monckton, Clerk.

[878] *United States Circuit Court of Appeals for the Ninth Circuit.*

JULIA E. HOFFMAN, Executrix, etc.,
Appellant.

vs.

JOHN McMULLEN,

Appellee.

JOHN McMULLEN,

Appellant.

vs.

JULIA E. HOFFMAN, Executrix, etc.,
Appellee.

No. 334.

Clerk's Certificate to Record in U. S. Circuit Court of Appeals.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eight hundred and seventy-seven pages, numbered from one to eight hundred and seventy-seven, both inclusive (contained in two volumes) to be a copy of the entire record in the above-entitled case in the said United States Circuit Court of Appeals, as the originals thereof remain and appear of record in my office.

Attest my hand and the seal of said United States Circuit Court of Appeals at San Francisco, California, this 14th day of March, A. D. 1898.

[Seal]

F. D. MONCKTON, Clerk.

[879] At a stated term, to-wit, the October term, A. D. 1897, of the United States Circuit Court of Appeals, for the Ninth Circuit, held at the courtroom, in the city and county of San Francisco, on Monday, the twenty-eighth day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

JULIA E. HOFFMAN, Executrix, etc.,
Appellant,

vs.

JOHN McMULLEN,

Appellee.

JOHN McMULLEN,

Appellant.

vs.

JULIA E. HOFFMAN, Executrix, etc.,
Appellee.

No. 334.

Order Denying Petition for Rehearing.

It is ordered that the petition for a rehearing heretofore filed herein be, and the same is hereby, denied.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the within entitled cause.

Attest my hand and the seal of said Circuit Court of Appeals this 14th day of March, A. D., 1898.

[Seal]

F. D. MONCKTON, Clerk.

880 UNITED STATES OF AMERICA, ss :

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit in which Julia E. Hoffman, executrix of the last will of Lee Hoffman, deceased, is appellant and John McMullen is appellee, and John McMullen is appellant and Julia E. Hoffman, executrix of the last will and testament of Lee Hoffman, deceased, is appellee, which suit was removed into the said circuit court of appeals by virtue of appeals from the circuit court of the United States for the district of Oregon, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme

881 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

882 [Endorsed:] Dock. No. 334. Supreme Court of the United States, October term, 1897. No. 622. John McMullen vs. Julia E. Hoffman, executrix, &c. Writ of certiorari. Filed May 21, 1898. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

883 In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN McMULLEN, Petitioner,

v.

JULIA E. HOFFMAN, Executrix of the Last Will and Testament
of Lee Hoffman, Deceased, Respondent.

It is hereby stipulated and agreed between the parties to the above-entitled cause that the certified transcript of the record on file in the Supreme Court of the United States in the matter of the petition of the above-named John McMullen for a writ of certiorari, addressed to the above-entitled United States circuit court of appeals for the ninth circuit, commanding said court to certify up to the Supreme Court of the United States the record in the causes and cross-appeals of Julia E. Hoffman, executrix of the last will and

testament of Lee Hoffman, deceased, appellant, *vs.* John McMullen, and John McMullen, appellant, against Julia E. Hoffman, executrix of the last will and testament of Lee Hoffman, deceased, from the circuit court of the United States for the district of Oregon, may be used upon the trial and hearing of this cause in the Supreme Court of the United States with like force and effect as though said transcript had been certified up at large by the clerk of the said United States circuit court of appeals for the ninth circuit in obedience to the writ of certiorari which has been allowed herein by the Supreme Court of the United States, and the clerk of the said United States circuit court of appeals may as a return to said writ of certiorari certify and transmit to the Supreme Court of the United States a transcript of this stipulation in lieu of a transcript of the record at large.

L. B. COX,
Of Counsel for Petitioner.
 RUFUS MALLORY,
Of Counsel for Respondent.

Dated this 18th day of May, 1898.

(Endorsed :) Stipulation. Filed May 21, 1898. F. D. Monckton, clerk.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing stipulation to be a full, true, and correct copy of a stipulation entered into between the respective parties relative to the return to the writ of certiorari herein as the original thereof remains of record in my office.

Attest my hand and the seal of said
 Seal United States Circuit United States circuit court of appeals for
 Court of Appeals, Ninth the ninth circuit, at San Francisco, Cal-
 Circuit. ifornia, this 23rd day of May, A. D. 1898.
 F. D. MONCKTON, *Clerk.*

885 United States Circuit Court of Appeals for the Ninth Circuit

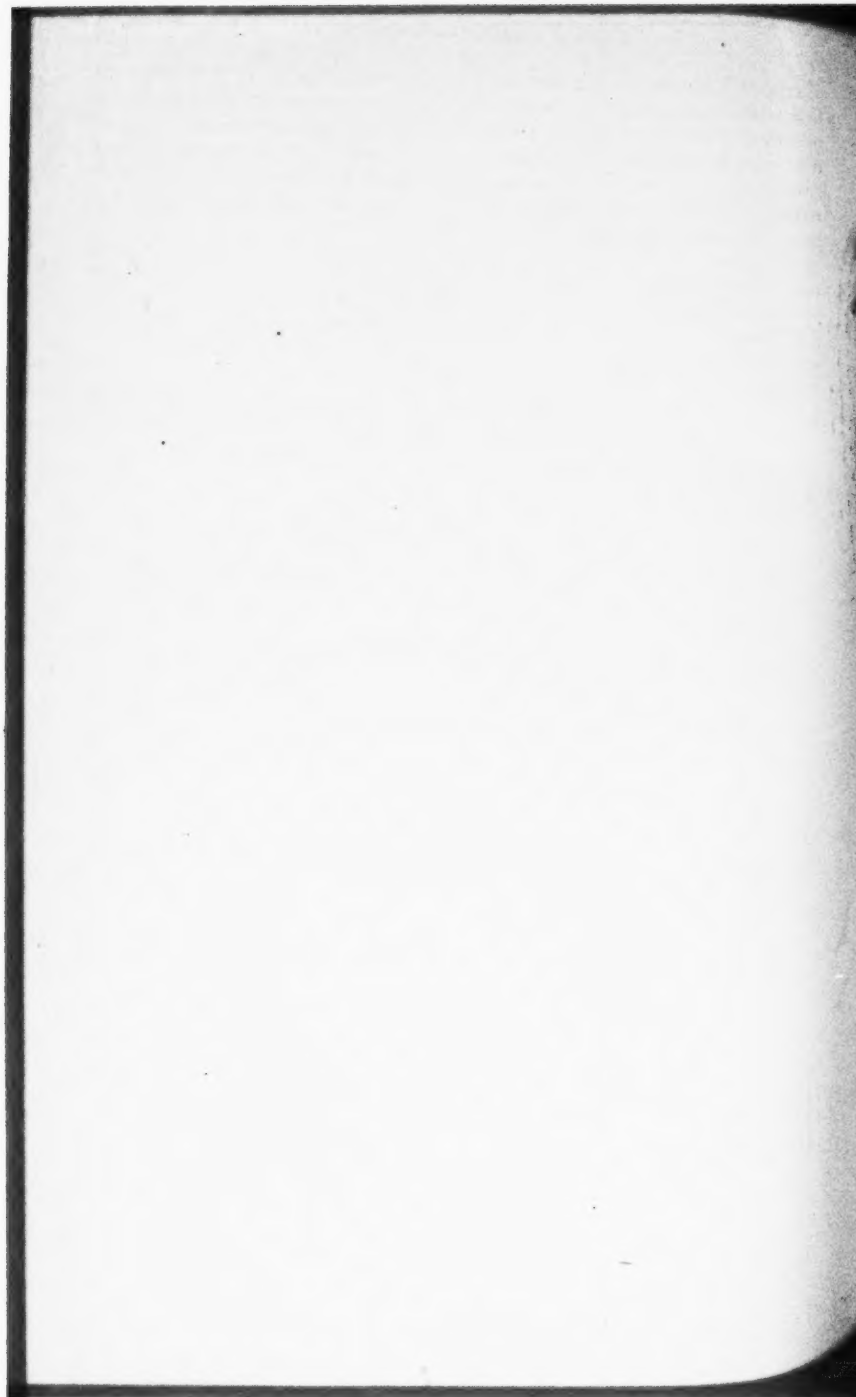
JULIA E. HOFFMAN, Executrix, etc., Appellant,	}	No. 334.
<i>v.</i>		
JOHN McMULLEN, Appellee,		
and		
JOHN McMULLEN, Appellant,		
<i>v.</i>		
JULIA E. HOFFMAN, Executrix, etc., Appellee.		

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari, issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court

of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above-entitled cause, do hereby attach to the said writ a certified copy of a stipulation entered into between the attorneys of record for the several parties in said cause on the 18th day of May, A. D. 1898, the original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

Attést my hand and the seal of said
Seal United States Circuit United States circuit court of appeals for
Court of Appeals, Ninth the ninth circuit, at San Francisco, Cal-
Circuit. ifornia, this 23rd day of May, A. D. 1898.
F. D. MONCKTON, *Clerk*.

886 [Endorsed:] Case No. 16,835. Supreme Court U. S., Octo-
ber term, 1898. Term No., 271. John McMullen, petitioner,
vs. Julia E. Hoffman, executrix, &c. Writ of certiorari and return.
Filed June 6, 1898.



Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 628 271.

JOHN McMULLEN, PETITIONER,

vs.

JULIA E. HOFFMAN, EXECUTRIX OF THE LAST WILL
OF LEE HOFFMAN, DECEASED, RESPONDENT.

Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit, under
the Act of Congress of March 3, 1891.

JOHN McMULLEN,
Petitioner.

L. B. COX,
WM. A. MAURY,
Counsel for Petitioner.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1897.

No.

JOHN McMULLEN, PETITIONER,

vs.

JULIA E. HOFFMAN, EXECUTRIX OF THE LAST WILL
OF LEE HOFFMAN, DECEASED, RESPONDENT.

**Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit, under
the Act of Congress of March 3, 1891.**

To the Honorable, the Supreme Court of the United States :

The petition of John McMullen, a citizen of the State of California, respectfully shows :

That on the 19th day of April, 1895, your petitioner commenced a suit in the Circuit Court of the United States for the District of Oregon, and by the bill of complaint filed in said suit, your petitioner sought a decree, for a dissolution of the copartnership theretofore existing between him and

said Lee Hoffman, for an accounting of the affairs of said copartnership, and for your petitioner's share of the assets of said copartnership, and of the profits realized thereby.

It was alleged in said bill of complaint and set forth therein, as your petitioner's cause of suit, that on the 6th day of March, 1893, your petitioner and said Lee Hoffman entered into a written agreement under their hands and seals, that they would share equally in the contract for manufacturing and laying pipe from Mt. Tabor to the head works of the Bull Run water system, for the City of Portland, which had theretofore been awarded by the Water Committee of said City, upon a joint bid put in by your petitioner and said Lee Hoffman, in the name of Hoffman & Bates, under which said Lee Hoffman carried on business in the State of Oregon, and which said contract was about to be formally entered into by the City of Portland and Hoffman & Bates; that your petitioner and said Lee Hoffman should each of them furnish and pay one-half of the expenses of executing said contract, and each of them receive one-half of the profits, or bear and pay one-half of the losses which should result therefrom, and further, that in case either your petitioner or said Lee Hoffman should get a contract to do, or should do, any other part of the work upon said Bull Run water system, the profits and losses of such contract or work should be borne by your petitioner and said Lee Hoffman equally; that on the 10th day of March, 1893, the City of Portland entered into a written contract with said Lee Hoffman, acting in the name of Hoffman & Bates and for the joint interest of himself and your petitioner, for the execution of the work covered by the bid before mentioned; that your petitioner and said Lee Hoff-

man entered upon the performance of said work, as copartners, and executed the same, and in so doing earned a profit exceeding \$35,000.00; that 90 per cent. of the contract price for said work was paid by the City of Portland, and 10 per cent. thereof was retained by said City in accordance with the provisions of said contract; that various work, not embraced in said contract, was performed by your petitioner and said Lee Hoffman, as copartners, upon said Bull Run system of water works; that all payments for said work had been made to said Lee Hoffman, who had kept all books of account, and that he refused to deliver to your petitioner his share of the profits of said work, or to render him any account of said partnership transaction; that the assets of said partnership, in addition to said sum of \$35,000.00, or more, and 10 per cent. of the contract price of said work of manufacturing and laying pipe, which was retained and unpaid by the City of Portland, consisted of certain plant, tools and other property, in the State of Oregon, of the value of \$5,000.00, or thereabouts.

Said Lee Hoffman filed an answer to said bill of complaint, in which he admitted the agreement of copartnership entered into by him and your petitioner on April 6, 1893, but pleaded, amongst other defenses to your petitioner's suit, that he and your petitioner had entered into a conspiracy against said City of Portland, prior to the putting in of bids for the work embraced in said Bull Run system of water works, whereby, in order to defraud said City, they agreed with each other, in effect, that they would each bid in apparent competition with the other, for the various parcels of work to be let; that in regard to the work of manufacturing and laying pipe, your petitioner had re-

quired said Lee Hoffman to lower a bid he (said Hoffman) had proposed to submit, about \$13,000, and said Hoffman had required your petitioner to increase a bid which he (your petitioner) had proposed to submit, about \$98,000.00, and that said bids so increased and decreased, respectively, were submitted to said Water Committee; and that by reason of the fraudulent practices of said Hoffman and your petitioner in the matters before stated, your petitioner was not entitled to recover from said Hoffman, in said suit.

Divers portions of the answer of said Lee Hoffman were excepted to by your petitioner, for impertinence, scandal and insufficiency, which exceptions were sustained in part and overruled in part. At this stage of the case, said Lee Hoffman died, and the cause was revived against Julia E. Hoffman, as executrix of his last will and testament. Thereupon your petitioner filed amendments to his bill of complaint and a general replication to the answer. The cause was thereupon referred to an examiner to take the proofs, which was duly done, and thereupon the Court, on June 23, 1896, made special findings of fact, and thereon a decree was entered in favor of your petitioner in said cause (record, vol. 1, pp. 91-6), determining that your petitioner and said Lee Hoffman had earned on said contract with the City of Portland for manufacturing and laying pipe \$509,825.22, and for extra work \$14,496.74; that your petitioner and said Lee Hoffman had earned in the business of conducting a camp store and a boarding-house for workmen, and by the sale of live stock belonging to them, from interest on money, and from other sources, a profit of \$15,339.76; that your petitioner and said Lee Hoffman had accumulated other assets, consisting of plant and tools, at a cost price of \$6,234.60; of furniture and

fixtures, at a cost price of \$167.85; of camp fixtures, at a cost price of \$1,246.16; and of miscellaneous accounts amounting to \$188.75; and also of a claim against the City of Portland, for work outside of said contract for manufacturing and laying said pipe, which claim had been disallowed by said City; and in and by said decree your petitioner was awarded judgment against the defendant Julia E. Hoffman, as executrix of the last will of Lee Hoffman, deceased, for the sum of \$52,241.18, and your petitioner was decreed to be a half owner with said defendant of the plant, tools, office furniture, fixtures, camp equipments and other property above mentioned, and also of the disputed claim of \$16,961.25, against the said City of Portland. It was further decreed that neither of the parties to said cause should recover costs from the other.

Your petitioner further shows, that both of the parties in said suit appealed from the decree rendered therein—the defendant, from the whole of said decree, so far as the same was adverse to her, and your petitioner from the allowance of \$12,000 made by the Court, as a salary to said Lee Hoffman for his services in superintending the execution of the work before mentioned, and also from the disallowance by the Court of your petitioner's claim for interest on the moneys withdrawn by said Lee Hoffman from the partnership business and withheld from your petitioner, and from the refusal of the Court to award your petitioner his costs of suit.

Your petitioner further shows, that said appeals came on regularly for hearing before the Circuit Court of Appeals for the Ninth Circuit, on the 15th day of February, 1897, and were argued by counsel for the respective parties; and

on the 4th day of October, 1897, said Circuit Court of Appeals rendered its decision, reversing the decree of said Circuit Court, and declining to consider the appeal of your petitioner (record, vol. 2, p. 595) ; that on the 5th day of February, 1898, your petitioner duly filed in said Circuit Court of Appeals a petition for a rehearing of said appeals, which petition was denied on the 28th day of February, 1898, and the decree was entered in said cause by said Circuit Court of Appeals, reversing the decree of said Circuit Court before mentioned.

Your petitioner respectfully represents that in the rendition of said decree of the Circuit Court of Appeals for the Ninth Circuit manifest errors occurred, and now exist, to the great damage of your petitioner, in the following particulars, to wit :

First. Said Circuit Court of Appeals held and decided that your petitioner was not entitled to recover in his suit, for the reason that in bidding for the work before mentioned, he put in a bid in concert with said Lee Hoffman, larger than his, which was not submitted in good faith, but was put in pursuant to a fraudulent agreement and conspiracy between your petitioner and said Hoffman, to deceive the Water Committee of the City of Portland, in regard to the bid put in by your petitioner and said Hoffman, in the name of Hoffman & Bates, and for the purpose of defrauding said City. Your petitioner denies that any such agreement or conspiracy was ever entered into, or that he ever put in a bid for any such purpose ; and your petitioner submits that if there had been any foundation whatever for such finding, said alleged fraudulent agreement

and conspiracy and fraudulent bidding could not affect the right of your petitioner to receive and recover his share of the profits realized in the partnership business carried on by your petitioner and said Lee Hoffman, or your petitioner's right to receive and recover his share of the assets of the partnership formed by your petitioner and said Lee Hoffman on March 6, 1893, inasmuch as all of said alleged fraudulent bidding and fraudulent action or conduct on the part of your petitioner and said Lee Hoffman would have been past transactions, completely ended before the formation of said partnership between your petitioner and said Lee Hoffman, and before they commenced the performance of any of the work from which the partnership profits were realized.

Your petitioner further represents that said decision of the Circuit Court of Appeals, is, in this respect, at direct variance with the principles heretofore laid down by this court in its decisions, notably in the cases of *McBlair vs. Gibbes*, 17 How., 232; *Brooks vs. Martin*, 2 Wall., 70; *Planters' Bank vs. Union Bank*, 16 Wall., 438; *Railroad Company vs. Durant*, 95 U. S., 576; and *Armstrong vs. Bank*, 133 U. S., 434. Said decision of the Circuit Court of Appeals is also at variance with the determinations of other federal courts, in like cases, as appears from *Burke vs. Flood*, 6 Saw., 220; *Western Union Telegraph Company vs. Union Pacific R. R. Co.*, 1 McCrary, 418, 558; *Wann vs. Kelly*, 2 McCrary, 628. And your petitioner respectfully submits that the decision of the Circuit Court of Appeals in this cause establishes a different rule in the Ninth Judicial Circuit from that established by the decisions of this Court, and from that which prevails in other circuits, and for such reason said

decision of the Circuit Court of Appeals in this cause should be reviewed and corrected.

Second. Your petitioner further shows, that if the decision of the said Circuit Court of Appeals in this cause were correct with reference to the contract made by the City of Portland with Hoffman and Bates for manufacturing and laying pipe, for the reason assigned therefor, such reason affords no ground for refusing to award your petitioner his share of the profits made on other work performed by your petitioner and said Lee Hoffman, as copartners, for the City of Portland, subsequently to said bidding and to the making of said contract, and entirely independent of them. Your petitioner also shows that in a stipulation of facts, entered into by the parties hereto for the purposes of the appeal, it was admitted (record, vol. 1, p. 119), that there had been earned as "extra work, not under contract, \$14,496.74," and that from a store, boarding laborers, and other sources, "a profit was realized, amounting to \$15,339.76;" and by the decree of the Circuit Court your petitioner was declared to be the half owner of said sums of money, and also of a disputed claim against the City of Portland, amounting to \$16,961.25, which stand in exactly the same case as the item of \$14,496.74 above mentioned, and of other partnership assets, the cost price of which was \$7,857.36; and your petitioner alleges that the decision of the Circuit Court of Appeals is clearly erroneous in not awarding your petitioner a half interest in the items mentioned.

Third. Your petitioner alleges that the finding of said Circuit Court of Appeals, upon which its decision in this

cause rests, viz.: that a corrupt agreement had been entered into between your petitioner and said Lee Hoffman to stifle or suppress competition in bidding for the work for which bids were invited by the City of Portland, of which the work of manufacturing and laying pipe was a part, is wholly unsupported by the evidence, and your petitioner submits that the evidence clearly establishes the contrary, namely, that there was no agreement or action whatever of your petitioner or said Lee Hoffman to stifle, suppress, or in anywise affect free competition in bidding for said work.

Fourth. Said Circuit Court of Appeals found and determined, and so set forth in the opinion filed in said cause, that in consideration of sharing in the profits on work awarded upon the bid submitted by said Lee Hoffman, your petitioner put in a fraudulent bid, higher than he otherwise would have submitted; whereas, the evidence clearly shows that it was never the purpose of your petitioner, or of said Lee Hoffman, to secure, or attempt to secure, any part of the work offered for competition by the City of Portland, as rivals in bidding for the same, or otherwise than as a joint venture entered into for mutual convenience and mutual advantage, without any design to defraud or wrong the City of Portland in anywise.

Fifth. Said Circuit Court of Appeals found and determined, and so set forth in the opinion filed in said cause, that a bid was submitted by your petitioner for the work of manufacturing and laying pipe which was higher in amount than the bid put in by the said Lee Hoffman, in the name of Hoffman & Bates, for the same work; that

said higher bid was submitted with a fraudulent object, for the purpose of deceiving the Water Committee of the City of Portland, and that the fraud, "if any," was in your petitioner and said Lee Hoffman holding themselves out to said committee as rival bidders, when in fact they were not; whereas, the evidence clearly shows that no bid was submitted by your petitioner with any such object or for any such purpose, and that the bid submitted by your petitioner could have had no tendency whatever to deceive said Water Committee, and that your petitioner had no reason to suppose that the submission of said bid would have any such tendency.

Sixth. Said Circuit Court of Appeals found and determined, and so set forth in the opinion filed in said cause, that your petitioner and said Lee Hoffman employed illegal means in order to obtain the award of said contract for manufacturing and laying pipe, by said Water Committee to Hoffman & Bates, and said Circuit Court of Appeals was manifestly influenced in the decision rendered in said cause, by such consideration; whereas, it clearly appears from the evidence therein that the means employed by your petitioner and said Lee Hoffman, in order to procure the award of said contract, were in all respects lawful and honorable.

Seventh. Said Circuit Court of Appeals found and determined, and so set forth in the opinion filed in said cause, that your petitioner was precluded from any recovery therein, for the reason that "the relief prayed for required the Court to investigate" all the transactions found by the Court to have been illegal and fraudulent, as a prerequisite to a

determination in your petitioner's favor ; whereas, the record in said cause clearly shows that your petitioner did not rely for a recovery therein upon any of said transactions, and did not introduce evidence as to any transactions which preceded the formation of the partnership between your petitioner and said Lee Hoffman. Said record shows also that complete proof was made by your petitioner, in said cause, as to the amount of the profits realized in the partnership business carried on by your petitioner and said Lee Hoffman, by introducing in evidence the partnership books, which contained full and complete particulars of all the partnership dealings and transactions, and showed the amount of money received each month from the City of Portland for the work performed by said partnership, the amount expended by said partnership in performing the same, and the balance remaining to the credit of said partnership, at the end of each month, after all of its debts and liabilities had been discharged. Said record shows also (record, vol. 1, p. 172) that your petitioner objected to the introduction of evidence, by the defendant, as to said alleged illegality and fraud in bidding for the work offered for competition by the said City of Portland, on the ground that evidence of transactions which occurred before March 6, 1893, when the partnership between your petitioner and said Lee Hoffman commenced, was irrelevant and immaterial.

As evidence of said alleged illegal and fraudulent transactions could have no tendency to disprove any of the facts necessary to be established by your petitioner in order to entitle him to recover in said cause it is manifest that such evidence could only be admissible, in support of an affirmative defense, in which those transactions were set up as

grounds for relief. It is clearly apparent, therefore, that it was not the relief sought by your petitioner which required the Court to investigate said alleged illegal and fraudulent transactions. His cause of suit was not dependent upon said transactions, or upon any of them. It was the defendant who asked for that investigation, and having induced said Circuit Court of Appeals to undertake it, succeeded in obtaining a reversal of the decree of the Circuit Court in favor of your petitioner, on the ground that said alleged illegal and fraudulent transactions prevented any recovery by your petitioner in said cause.

Your petitioner, being without other or further remedy in the premises, now respectfully presents this, his petition, accompanied by a certified copy of the record in said cause and his brief in support thereof, and prays that a Writ of Certiorari may issue out of this Court, directed to said United States Circuit Court of Appeals for the Ninth Circuit, requiring said Circuit Court of Appeals to certify the record of said cause to this Court for its review and determination.

And your petitioner prays for such other or further relief in the matter, as to this Honorable Court may seem meet.

And your petitioner will ever pray, etc., etc., etc.

JOHN McMULLEN,
Petitioner.

L. B. COX,
WM. A. MAURY,
Counsel for Petitioner.

UNITED STATES OF AMERICA, }
Northern District of California. }⁸⁸:

John McMullen, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true.

JOHN McMULLEN.

Subscribed and sworn to before me this 16th day of March, 1898.

[SEAL.]

W. B. BEAIZLEY,
Deputy Clerk U. S. Circuit Court,
Northern District of California.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 622.

JOHN McMULLEN, PETITIONER,

vs.

JULIA E. HOFFMAN, EXECUTRIX OF THE LAST WILL
OF LEE HOFFMAN, DECEASED, RESPONDENT.

**Brief of Petitioner in Support of His Petition for a
Writ of Certiorari to the United States Circuit Court
of Appeals for the Ninth Circuit.**

The primary ground of the petition submitted in this cause is that of a divergence on the part of the court of appeals for the ninth circuit from the principles laid down by this court as controlling the disposition of such causes as that under consideration; or, in brief, that the decision against which this petition is addressed is at variance with the decision of this court in *Brooks vs. Martin*, 2 Wall., 79 and the subsequent rulings of the court in line with that case. If a departure has been made by the court of appeals,

as we contend, it has occurred in the administration of general jurisprudence; it has declared for the ninth circuit a different rule from that established by this court; it is at variance with the decisions rendered in other circuits in like cases, and is a disturbing factor in the federal jurisprudence of the country. One of the chief grounds for the exercise of the relief here sought is that of preserving uniformity of decision, and we believe the case under consideration merits the corrective action of this court.

In February of 1893 the city of Portland, Oregon, advertised for sealed proposals for the construction of a system of water works, the bids to be opened March 1. The petitioner, a resident of San Francisco, and Lee Hoffman, a resident of Portland, were desirous of bidding on the work, but neither of them feeling that he could undertake it singly, for reasons of convenience and advantage they determined to combine their forces. To this end they entered into a verbal agreement to bid for the work, which was to be let in parcels, and that if they should succeed in securing any part of it they would jointly execute the same and share equally its profits and losses. In pursuance of this agreement they did make bids, not single proposals in their joint names, but each bid separately on the same work, petitioner in the name of the San Francisco Bridge Company, a corporation of which he was general manager, and Hoffman in the name of Hoffman & Bates, a title under which he conducted business. On the item of manufacturing and laying the pipe a bid so submitted by Hoffman was found to be the lowest, entitling him to the contract therefor.

On March 6, 1893, petitioner and Hoffman entered into the following contract (record, vol. 2, p. 492):

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and

Bates have, with the assistance of said McMullen, at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid.

"It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits, or bear and pay one-half of the losses, which shall result therefrom.

"And it is further hereby agreed that, if either of the parties hereto shall get a contract for doing or do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike."

On March 10 the city of Portland entered into a contract with Hoffman, agreeing to pay him for the work contemplated \$465,722, with a right reserved for modifications, increasing or diminishing the contract price. Petitioner and Hoffman entered upon the joint execution of the work covered by the contract, and there was eventually earned under it \$509,825.22. Other work was done, for which the city of Portland paid \$14,496.74, and for which the additional amount of \$16,961.25 was claimed and disallowed by the city. As profits from conducting a camp and store for the men employed, from sale of live stock, etc., an additional sum of \$15,339.76 was realized, and there had accumulated, in the way of plant, tools, furniture, camp fixtures, etc., property of the cost price of \$7,857.36. From all sources a profit exceeding \$100,000 was made. (Record, vol. 1, pp. 94-'5.) These facts were developed on taking the proofs. All the money allowed by the city was paid over without objection.

By agreement between the parties Hoffman exercised su-

perintendence of the work, kept all books of account, and received all moneys which the city paid. At the termination of the work petitioner demanded of Hoffman an accounting, and, upon Hoffman's refusal to come to an adjustment, petitioner brought a suit in equity for a settlement of the partnership affairs and the payment of his share of the profits. In his answer Hoffman admitted the partnership agreement of March 6, but pleaded in defense of petitioner's demand that he and petitioner had entered into a corrupt conspiracy to mislead and defraud the city of Portland, and had carried it out by submitting their bids in the way in which it was done,—that is to say, as apparent competitors for the work offered, when they were not competitors in fact. Petitioner excepted to the allegations constituting this defense, and the exceptions were sustained in part, but chiefly overruled. (For opinion see record, vol. 1, p. 58.) Issue was joined, the proofs taken, and on final hearing a decree was entered in favor of petitioner for the recovery of \$52,519.80, and holding that petitioner was in addition the half owner of the disputed claim for extra work of \$16,961.25 and the items of camp equipment of \$7,857.36 above mentioned. (Record, vol. 1, pp. 91-'6.)

Petitioner has throughout the litigation denied the charges of fraud preferred against him, but he has also contended that under the rule laid down in *Brooks vs. Martin* he is entitled to a decree, whatever conclusion the court might reach on this issue. The circuit court of appeals held that *Brooks vs. Martin* afforded petitioner no protection, and made a sweeping reversal of the decree of the lower court. On a petition for a rehearing the court declined to recede from or modify their views.

The contract of March 6, 1893, established the relationship of partners between Hoffman and petitioner; and out of this relationship, and not out of the partnership agreement, grew the rights which petitioner is seeking to enforce in this suit.

Some preliminary consideration of the rights and obligations existing between partners and between principal and agent may prove of utility in approaching a discussion of *Brooks vs. Martin*, and likewise a discussion of the legal questions involved in the pending case.

Partnership is a condition. Its results are determined by the application of legal principles. It may have its origin in an express contract, and the contract may be useful in furnishing a guide for the measurement of the rights and duties of the partners *inter se*. In case of a controversy, its settlement must be determined in the light of the contract stipulations. But the contract is only a matter of evidence in determining the adjustment of conflicting claims growing out of transactions had under it. As to such matters, it is not a cause of suit, nor is the cause of suit predicated upon it. After an agreement to form a partnership has been entered into, if either partner refuses to proceed,—to launch the partnership,—the other may have his action for damages for breach of the contract, or, it may be, a suit for specific performance. In such a case the cause of action rests upon and grows out of the contract to be partners. But after the partnership has once been launched, if a controversy arises between the partners, the cause of action grows out of and rests upon the partnership *relation*; and if a claim to property is involved, it is the property right of the partner, growing out of the partnership relation, although the extent of the right may be defined by the contract, which gives him his standing in court.

In Lindley on Partnership, 2d Am. ed., p. 2, it is said :

"Partnership, although often called a contract, is in truth the *result* of a contract; the *relation* which subsists between persons who have agreed to share the profits of some business, rather than the agreement to share such profits."

In Mechem's Elements of Partnership, p. 3, speaking of the definition of "partnership" sometimes given in works on that subject, it is said :

"In several of the definitions, partnership is spoken of as a contract. It is, however, rather the *result* of a contract than the contract itself; it is the *relation* or association which the contract creates."

And in Bates on Partnership, vol. 1, sec. 78, it is said :

"An executory contract to form a partnership is not a partnership, though it may ripen into one by being what is called launched—that is, by carrying the agreement into effect and engaging in the joint undertaking; but the effect and the agreement itself are two different things."

So also, in Pollock's Digest of the Law of Partnership, sec. 1, it is said :

"Partnership is the *relation* which subsists between persons who have agreed to share the profits of a business carried on by all or any of them, on behalf of all of them."

In Parsons on Partnership, 4th ed., sec. 6, note *d*, speaking of an executory contract to form a partnership, it is said :

"The contract is executed when the partnership relation is entered into. All that is done after that, is done by and for the partnership. If land is purchased, it is the land of the partnership, and not of the individual partners. In short, the only action that could be brought for breach of the contract would be an action for failure to launch the partnership. Any cause of action arising after the partnership was formed would arise out of the partnership relation."

Another principle applicable to the point under consideration is that the relation of partnership is one of agency. What one partner does is done as agent for the other; what one receives is received as agent for the other and in trust for the other to the extent of his interest; and the agent or trustee cannot shield himself from accountability by claiming that the thing which had come to him was tainted.

In Story on Partnership, sec. 1, it is said:

"Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules as those of an agent. A partner, indeed, virtually embraces the character both of principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may as properly be deemed an agent. The principal distinction between him and a mere agent is, that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership."

Speaking of this statement of the law relating to partners, Lord Wensleydale, in *Cox vs. Hickman*, 8 H. of Lords Cas., 268, 311, said:

"The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject if this true principle were more constantly kept in view. Mr. Justice Story lays it down in the first section of his work on Partnership."

That a partner who receives money or other property on behalf of a partnership owes substantially the same duty as an agent owes to his principal, viz., to account for and deliver the money or property received, is fully recognized and stated in Lindley on Partnership, 2d Am. ed., vol. 1, pp. *107-*108, where the learned author of that work, now the

presiding judge of the court of appeal in chancery, in England, says:

"*Tenant vs. Elliot*, 1 Bos. and P., 3, *Farmer vs. Russell*, *id.*, 296, and other cases, decided that if A and B are parties to an illegal contract, and B, in pursuance thereof, pays money to C for A's use, A can recover this money from C. It follows from this that if two partners, A and B, enter into an illegal agreement with C, and in pursuance of this agreement C pays money to D for the use of A and B, not only can A and B recover this money from D, but if he pays it over to either one of the two partners, that one must account to the other for his share of it. This must also be the case if C, instead of paying the money to D, pays it over at once to A or B. In other words, it follows from *Tenant vs. Elliot* and that class of cases, that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the partnership from such act, and the money representing that gain has been actually paid to one of the partners for the use of himself and co-partners, he cannot set up the illegality of the act from which the gain accrued as an answer to the demand by them for a share of what he has received. Upon this principle it was held in *Sharp vs. Taylor*, 2 Ph. Ch., 801, that a partner was entitled to an account against a copartner of moneys actually come into the hands of the latter from the employment of a ship in a manner not permitted by the navigation laws."

That the same rule applies between partners as between principal and agent is clearly shown by the decision in *Planters' Bank vs. Union Bank*, 16 Wall., 483, which was a clear case of agency, and in which *Brooks vs. Martin* was followed as having settled the law applicable to the case.

The underlying principle in *Brooks vs. Martin* and cognate cases is, that the plaintiff in each of them had a property interest in the subject of the suit and a right to require the defendant to respond to his demand, growing out of the relationship between the parties; and the plaintiff's right to recover could not be defeated by showing that he had participated in some illegal transaction which had been consummated before the subject of the controversy came into existence.

In *Brooks vs. Martin* the facts were that Brooks, Martin and Field had entered into a partnership agreement to engage in a business which this court explicitly declared to be inherently unlawful, and the fruits of the business, which became the subject of the controversy between them, were the direct wages of iniquity. Martin sued for an account of the partnership transactions and to recover his share of the profits. He prevailed, and the fundamental principles on which he succeeded were, that his cause of suit was a property right which grew out of his partnership relation with Brooks, and that his share of the profits, which were in Brooks' possession, was held by the latter in trust, and it did not lie in his mouth to question the source from which the profits had come. The corrupt agreement between the partners did not afford nor restrict the cause of suit, although it was necessarily referred to by the court for the purpose of ascertaining the proportions and manner of the division of the assets which was decreed.

Mr. Justice Miller, who delivered the opinion of the court, said (pp. 78-79):

"We think that, in point of fact, the allegation of the answer,—that the traffic in which the firm engaged was the buying up of soldiers' *claims*, before any scrip or land warrants were issued, and not the purchase and sale of bounty

land warrants and scrip—is true. We have as little doubt that the traffic was illegal. Undoubtedly, the main object of the ninth section of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. It was a wise and humane policy, and no court could hesitate to enforce it, in a case which called for its application. If a soldier, who had thus sold his claim to Brooks, Field & Co., had refused to perform his contract, or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it, or given them any relief against him. And if they had, by any such means, got possession of the land warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land warrant or scrip to the soldier. Or if Brooks, after the signing of these articles of partnership, had said to Martin, 'I refuse to proceed with this partnership, because the purpose of it is illegal,' Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, 'I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance according to your agreement,' Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such a refusal. To this extent go the cases of *Russell vs. Wheeler*, 17 Mass., 281, *Sheffner vs. Gordon*, 12 East, 304, *Belding vs. Pitkin*, 2 Caines, 149, and the others cited by counsel for appellant, and no further.

"All the cases here supposed, however, differ materially from the one now before us. When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed.

Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

The learned justice then cited with approval *Sharp vs. Taylor*, 2 Ph. Ch., 801, and concluded that the decree of the lower court was correct.

Brooks vs. Martin followed *McBlair vs. Gibbes*, 17 How., 232, and since has been followed by this court without question, and the rule laid down applied to a variety of controversies. The first case of prominence succeeding it was that of *Planters' Bank vs. Union Bank*, 16 Wall., 483. The Planters' Bank of Natchez, during the civil war, sent to the Union Bank of New Orleans a lot of Confederate securities to be disposed of for account of the former bank. This was done, and the Union Bank failing to make settlement, the Planters' Bank brought suit in a State court to recover the amount which had been realized. The Union Bank pleaded in defense that the traffic was in aid of the Confederate government and was consequently illegal. On writ of error this court said (p. 499):

"Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may

be that no action would lie against a purchaser of the bonds, or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

And in *Railroad Company vs. Durant*, 95 U. S., 576, certain tracts of land had been conveyed in trust to Durant, as vice-president of the Union Pacific Railroad Company, in consideration of the location of the Omaha terminus of the road at a particular point. The railway company contended that the lands were held in trust for it, and, upon Durant's refusal to convey, sued to recover them. The lower court dismissed the bill upon a finding that the conveyances were obtained through an illegal exercise by Durant of his power and position, as acting president and acting manager, and that he held the land of said company in trust for the grantors. The supreme court reversed this decree, saying (p. 578):

"The conveyances to the trustee were, in the view of the law, the same thing as if they had been to the company. The transaction between the parties in interest was thus finally closed. There will be neither more nor less of illegality between the original parties, whether the trustee does or does not respond to his obligation to the company.

In that obligation there is no pretense for saying there is any taint of any kind; and it is that obligation alone which it is sought to enforce by this proceeding."

In the ninth circuit, before the establishment of the court of appeals, the rule of *Brooks vs. Martin* was recognized by Judge Sawyer. In *Burke vs. Flood*, 6 Saw., 220, a matter of a partnership accounting arose in a case where it was alleged that a fraud had been perpetrated by Flood and his associates upon a third person, and it is said (p. 227):

"When money has come into the hands of a partnership on a partnership transaction, however unlawfully or wrongfully acquired as between the members, it is partnership assets, and must be accounted for as such as between themselves." (*McBlair vs. Gibbes*, 17 How., 237.)

The learned judge then quotes from *Brooks vs. Martin* and applies the decision to the case then in hand.

In the eighth circuit the courts have had occasion to apply the rule. In *Western Union Telegraph Company vs. Union Pacific Railway Company*, 1 McCrary, 418, 558, the complainant filed a bill alleging a contract between the parties, whereby the complainant had the right to maintain a telegraphic line along the defendant's right of way, and it was alleged that defendant was interfering with the right thus conferred and threatening to cut the wires which complainant had strung, in consequence of which an injunction was prayed. The contract contained stipulations that the officers of the railway company should have free use of the complainant's wires for their private affairs, and this provision was held to be against public policy, and therefore to avoid the entire contract. A demurrer to the bill was sustained, with leave to amend. In the amended bill it was set forth that certain property rights had been acquired by the complainant under the contract, and it was contended

that the court should protect these rights. This view was sustained, McCrary, J., saying (p. 562):

"Even if we assume that the contract is void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract. Such is the doctrine established by the Supreme Court of the United States."

After citing with approval *Planters' Bank vs. Union Bank*, *McBlair vs. Gibbes*, and *Brooks vs. Martin*, the opinion proceeds (p. 563) as follows:

"In *Brooks vs. Martin* it was held, upon full consideration, that after a partnership transaction, confessedly in violation of an act of Congress, has been carried out, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract. All of these cases admit the invalidity of a contract bottomed in immorality or in violation of a statute, and they all agree that where a party comes into court and asks relief upon such a contract it must be denied. But they make a distinction between those cases in which a court is asked to enforce such a contract, and those in which a court is asked to deal with property which has been acquired as the result of the execution thereof. Such property may constitute the subject-matter of a suit at law or in equity, notwithstanding the invalidity of the contract under which it was acquired."

It will be observed that the rule of *Brooks vs. Martin* was applied in this case to property acquired under a contract which was still executory.

Another application of the same rule is to be found in *Wann vs. Kelly*, 2 McCrary, 628, where the parties to the suit, together with a third party, engaged in a stock-gambling transaction which proved profitable. Kelly got the proceeds and refused to account to Wann for his share; where-

upon the action was instituted. The court (Nelson, J.) found in favor of the plaintiff, saying (p. 630):

"It is urged by Kelly that the business in which the parties engaged was contrary to public policy and illegal, and therefore he can retain all the profit which resulted therefrom without recognizing his associates jointly interested, and that a court will not enforce the plaintiff's claim. Such is not the law. The agreement between the parties related to a single transaction, and when the business closed, and Kelly received the profits, he was in duty bound to pay over to the plaintiff his part of it. If the speculation was contrary to public policy and illegal, it had been closed, wound up, and the illegal object of it had been accomplished. It is settled by the United States Supreme Court (*McBlair vs. Gibbs*, 17 How., 237; *Brooks vs. Martin*, 2 Wall., 70, and authorities cited) that when the illegal contract is completed, and money has been received by a joint owner by force of the illegal contract, he will not be permitted to retain it, and cannot protect himself by setting up the illegality of the transaction in which it was paid him, but must account to his associates."

In the opinion rendered by Judge Bellinger on the final hearing, in which he candidly admitted he had been misled by his first impressions of the application of certain decisions which had been cited by the defendant,—and it may be said the circuit court of appeals have construed these decisions and relied upon them just as Judge Bellinger did in the first instance,—he says (record, vol. 1, p. 98):

"When these questions were considered by me on the exceptions to the answer (69 Fed. R. 509), I was of the opinion that it was within the principle of those cases involving agreements for a division of the fees of public offices and for compensation for services in lobbying. This, I am convinced, was an erroneous view of the question. In one of those cases the court is asked to compel by its judgment the very thing prohibited by public policy, while in the other it is asked to compel payment for a service forbidden by such policy. The question of division of profits between two parties having equal right is a very different one. The

distribution of the profits of this contract, which are as much the property of one of the parties as of the other, does not violate any rule of morals or of public policy."

We have quoted at such length from these decisions for the purpose of showing the different conditions in which the rule under consideration has been applied, governing, as it does, questions of partnership, of agency, of traffic agreements, and of general dealings of one party with another. It is held to apply as well to matters which are *mala in se* as to those which are *mala prohibita* only, and the decisions clearly point out, define and limit the instances in which such defenses as those interposed in *Brooks vs. Martin* and in the pending cause may be made available. It is only when the very thing which embodies the vicious element is open and is brought before the court for action which must be predicated upon it that the defense may be made good.

Now, to the apprehension of counsel for petitioner, nothing could be more absolutely clear and free from doubt than that the rule laid down in *Brooks vs. Martin* controls the pending cause, and that the conclusion reached by the circuit court of appeals cannot stand consistently with that rule. And yet there is a marked difference in the character of the two cases. In *Brooks vs. Martin* the whole purpose and existence of the partnership was inherently unlawful; but it is not so in the pending case. The work contemplated by the city of Portland was lawful, and the city invited proposals for its performance. It was lawful for Hoffman and petitioner to combine their forces for securing and executing the work. Their partnership agreement in its objects was unobjectionable. The contract between the city and Hoffman was in itself a proper one. The only ground of attack upon the entire proceedings is that in the accomplishment of their purposes Hoffman and petitioner did an illegal act, to which act, be it observed, the city of Portland has never intimated an objection. It

was essentially a "transaction," in the language of the cases above cited, which was absolutely concluded prior to the 6th day of March, the date of the partnership agreement between Hoffman and petitioner, and prior to the performance of any substantive work from which the moneys and property which constitute the subject of this suit were earned. The case is exactly within the language of Lindley (*supra*, p. 8), in which he says:

"It follows from *Tenant vs. Elliot* and that class of cases, that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the partnership from such act, and the money representing that gain has been actually paid to one of the partners for the use of himself and copartners, he cannot set up the illegality of the act from which the gain accrued as an answer to the demand by them for a share of what he has received."

If *Brooks vs. Martin* was well decided, *a fortiori* the same rule should determine the pending cause in petitioner's favor.

It is true that the attitude of the respondent is that the manner in which she says the contract between Hoffman and the city of Portland was secured poisons everything which has since been done, and this view seems to have met the approval of the circuit court of appeals. In what we may be excused for denominating a confused way of speaking, allusion is made to the "illegal" contract of copartnership and to the "illegal" contract with the city of Portland. We assume that this can mean no more than that there were illegal practices indulged in by the partners, and that the contract with the city was secured in an illegal manner; but, placing that construction upon the facts involved, for the sake of argument, the respondent is not extricated from the binding force of the rule of this court.

Allowing her own construction, or any construction of which the case is susceptible, as to the purposes or action of the partnership existing between Hoffman and petitioner,

the facts remain that when they had despoiled the city, if you please, and had secured a right to the contract which yielded the money in suit, Hoffman did not stop and decline to go further with petitioner. He entered into the engagement of March 6, which was in effect an equitable assignment to petitioner of a half interest in the contract to be entered into between himself and the city of Portland; he delivered to petitioner his share of the booty in the only way in which it was capable of delivery, and thereafter he stood to petitioner as a trustee of petitioner's interest in the city contract, and everything which might be earned under it, and was bound to account to his *cestui que trust* just as any other trustee would have to do in regard to trust property.

In Lewin on Trusts, p. 68, it is said:

"If the settlor proposes to *convert himself* into a trustee, then the trust is *perfectly created*, and will be enforced, so soon as the settlor has executed an express declaration, intended to be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable, whether it be capable or incapable of transfer."

Again, after the agreement of March 6 had been signed, Hoffman did not, as is shown by Mr. Justice Miller in *Brooks vs. Martin* (p. 79) he might have done, refuse to go further on the ground that there was illegality in the object of the partnership, but he and petitioner actually launched the partnership and proceeded to execute the substantive work which was to be performed for the city of Portland. Suppose Hoffman and petitioner had joined in a sale of their contract with the city to a third person and the money had been paid to Hoffman, would the matters which he has set up in this case have been any defense to an action brought by petitioner for his share of the proceeds? And how does the case differ because instead of doing this they worked out the contract and the money earned was paid

over to Hoffman by the city? However the money reached his hands, Hoffman received petitioner's portion as agent and trustee; petitioner's title to it was a property right growing out of his relationship with Hoffman as a partner, and these facts constitute the basis of petitioner's claim, against which Hoffman's defense cannot prevail, for the simple reason that petitioner's right to recover does not depend upon the matters set up in defense. He has not invoked them in aid of his cause, nor asked the court to investigate them.

A series of cases decided in the New England States in connection with their Sunday laws seems to us to make clear the distinction for which we contend. Thus in *Hall vs. Corcoran*, 107 Mass., 251, the defendants hired from plaintiff on a Sunday a horse and sleigh to drive from South Adams to North Adams. From the latter point the defendants drove to Clarksburg, and on this trip the horse and sleigh were injured. To an action for damages the defendants pleaded an illegal contract of hiring. The supreme court said, page 257:

"The wrong committed by the defendants, for which they were sued, was not, as we have already seen, a breach of the illegal contract by which he [plaintiff] put his property into their hands; nor is the ground of this action an abuse of the possession which they had thus acquired by his consent, but it is a direct invasion of the plaintiff's general right of property, wholly outside of any contract between the parties, by the wrongful driving of the horse between North Adams and Clarksburg, and thus assuming control of the property for their own benefit, without any authority or license from the owner."

* * * * *

"Proof of the contract under which the horse was delivered by the plaintiff to the defendants showed, indeed, that the driving of the horse beyond North Adams was not within its terms or object; but the only legitimate inference from that fact is that it is wholly immaterial whether such a contract was ever made, or, if once made, whether it had been terminated by mutual assent of the parties or by the

wrongful act of the defendants. In short, the defendants' liability for the injury done by them to the plaintiff's property is not affected by the question whether the contract between the parties was valid or void in law, or whether there was or was not any such contract in fact. That contract need not, therefore, be shown by the plaintiff; and if proved by the defendants, by cross-examination of the plaintiff's witnesses or otherwise, it has nothing to do with the plaintiff's cause of action against the defendants."

So in a like case in New Hampshire,—*Woodman vs. Hubbard*, 5 Foster, 67,—the court said, page 74:

"In this case the defense set up is that the plaintiff's contract was not merely invalid, as in the case of infancy, but illegal; and that in showing the conversion of the horse, by driving beyond the place for which he was hired, the plaintiff was obliged to prove his own illegal act.

"It has been sometimes laid down in general terms that the plaintiff cannot recover, if, in order to make out his case, he is obliged to show his own illegal act. This is undoubtedly the rule when the plaintiff's illegal act is, in whole or in part, *the foundation of his claim*. In the cases usually cited as authorities for this rule, the plaintiff's claim was made through or under the illegal act. (*Simpson vs. Bloss*, 7 Taunton, 246; *Fivaz vs. Nichols*, 2 M., G. & S., 500). But where the wrong is done to the plaintiff's property, and the facts are connected with an illegal contract respecting the property, which does not affect the plaintiff's right of property, these cases do not show that he cannot recover, because he is incidentally obliged to prove a contract which leaves his *right of property* untouched and does not, in its consequences, reach to the case on which he relies."

Petitioner's suit against Hoffman was founded on *property rights* entirely, viz., upon petitioner's equitable ownership of a half interest in the contract made by the city of Portland with Hoffman and on petitioner's ownership of one-half the profits realized from the partnership business carried on by Hoffman and himself, while the fraud and illegality set up by Hoffman and found by the court of appeals lay in trans-

actions which did not in any manner affect the property rights mentioned. It is therefore plain that Hoffman's defense of fraud and illegality did not reach the case made and relied on by petitioner.

If respondent's contention as to the character of the verbal agreement between Hoffman and petitioner which antedated the bidding were true, the matters set up by her cannot avail as a defense, for the reason that the stipulations which she contends were entered into were divisible, and the legal part of the agreement would stand alone.

Again, taking up the contention of respondent and going back to the original engagement between Hoffman and petitioner, we submit that if there had been any fraud or illegality in that portion of their agreement by which they were to bid jointly, this would not affect the other portion by which they were, if they got a contract, to become partners for the performance of the work.

The two portions are quite distinct and separate, and might, if it had been so desired, have been embodied in separate contracts, made at different times. That such is the case is quite clear when it is considered that if, after the contract for manufacturing and laying the steel pipe had been awarded, Hoffman and petitioner had sublet all of the work, or had sold and assigned the contract to a third party, there would then have been no necessity whatever for them to become partners in order to perform the contract. On the other hand, if the contract for manufacturing and laying the pipe had been awarded to some party other than Hoffman and petitioner, and they had bought the contract from the party to whom it was awarded, they could just as well have become partners and performed the work of manufac-

turing and laying the steel pipe as they could had the contract been awarded to them.

And the promises of Hoffman and petitioner, which constituted the consideration in each of said portions of their agreement, were also distinct and separate, the promises in one portion being absolute, viz., to bid jointly; whilst in the other portion the promises were conditional, viz., if a contract should be awarded on a joint bid put in by them they would become partners for the performance of the work.

Hence each portion of said agreement between Hoffman and petitioner was readily severable from the other, and each was substantially a distinct contract, which could if necessary be enforced quite independently of the other.

In *Oregon Steam Navigation Co. vs. Windsor*, 20 Wall., 64, it is said on pages 70-71:

"And the question arises whether the contract is so divisible in relation to the California portion that it can stand for the seven years for which the Oregon company is bound, though it be void as to the remaining three years. We think it is so divisible. It is laid down by Chitty as the result of the cases, and his authorities support the statement, 'that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether.' The cases cited in support of this proposition are *Chesman et ux. vs. Nainby*, 2 Strange, 739, *Wood vs. Benson*, 2 Crom. & Jer., 94, *Mallan vs. May*, 11 Meeson & Welsby, 653, *Price vs. Green*, 16 Id., 346, *Nicholls vs. Stretton*, 10 Queen's Bench, 346. In *Price vs. Green* the contract was not to exercise the trade of a perfumer in London, or within six hundred miles thereof; and it was held divisible and good for London only. This case was carried through all the courts. In *Nicholls vs. Stretton* the stipulation was that an attorney's apprentice, who was to serve five years, should not, after his term expired, be concerned as attorney for any persons who had,

previous to the expiration of said apprenticeship, been a client of the attorney with whom the contract was made, or who should at any time thereafter become his client. It was strenuously and fully argued that whilst the contract might have been good as to past clients it was certainly not good as to future ones, and being an entire contract, the whole was bad. But the court followed the previous decision of the exchequer chamber in *Price vs. Green*, held the contract divisible, and sustained the action. We see no reason why this principle should not be followed in the present case. The line of division between the period which is properly covered by the restriction and that which is not so, is clearly defined and easily drawn. It is subject to no confusion or uncertainty, and the court can have no difficulty in applying it."

And in *Pickering vs. R. R. Co.*, L. R., 3 C. P., 250, Willes, J., said:

"The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

So also in *Bank of Australasia vs. Breillat*, 6 Moore's P. C. C., 201, it is said:

"From Pigot's case (6 Coke's Rep., 26,) to the latest authorities, it has always been held that, when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal, at common law, the performance of those which are legal may be enforced though the performance of those which are illegal cannot."

It is clear, therefore, that if there had been any illegality in the agreement between Hoffman and McMullen to bid together, or any fraud on their part in obtaining the contract with the city of Portland, that could not affect the validity of their agreement to become partners if a contract should be awarded, or have any effect upon the partnership

afterwards formed by them, or on any of their partnership obligations or transactions in the business of manufacturing and laying steel pipe and doing other work in connection with the construction of water works for said city.

The circuit court of appeals wholly misapprehended the doctrine of *Brooks vs. Martin*.

Great misapprehension seems to have existed as to the true significance of *Brooks vs. Martin* in its application to this case, and this misapprehension has induced an attempt to draw a distinction between that case and the pending one. It is said that the partnership agreement in the former case had been executed, while here it had not been, and stress is laid on the fact that the land warrants had been located and some of the lands sold. We have endeavored to show that the partnership agreement is not the foundation of this suit, nor was it the foundation of the suit in *Brooks vs. Martin*, and consequently the discussion of this question can hardly prove profitable. But taking the proposition as it has been advanced, we say that the partnership agreement was no more executed in *Brooks vs. Martin* than here; the work of the partnership—the purchase of land claims—had been completed, just as here the work of manufacturing and laying the pipe had been completed, and nothing remained open or to be done in either case, when suit was brought, except to divide the earnings of the partnership.

Again, stress is laid upon the fact that Hoffman had in hand only money which had come to him from the city of Portland without any transformation, whereas in *Brooks vs. Martin* warrants had issued on the land claims and many of them had been located. In the case in hand money is the commercial medium of a settlement between the parties, and it does not seem to us that it makes any difference that it has been secured immediately, rather than at the end of

two or three filtering processes; and to us it seems that the significance of the reference to this transformation in Mr. Justice Miller's opinion is, that the court were called upon to deal with assets which had been purged of their uncleanness and had assumed a valuable character. In other words, if Brooks had held among the assets in his possession a lot of soldiers' claims upon which warrants had not issued, and Martin had sued at that stage of the partnership life and asked the aid of the court in carrying out the agreement in some way which would have required the court to take action on these claims, it would have declined to do so because they were illegal and were not property or of value, the statute having declared them "null and void to all intents whatsoever." Except, therefore, for the transformation which had taken place there would have been nothing to which the jurisdiction of the court could have attached. By the change the claims had assumed the form of the "thing of value" which was one of the declared grounds of jurisdiction in *Planters' Bank vs. Union Bank*.

Analysis of the opinion of the circuit court of appeals in the light of the cases previously cited herein.

In his dissenting opinion in *Burck vs. Taylor*, 152 U. S. 634, Mr. Justice Jackson said, on page 670:

"The attempt to draw distinctions between decisions which involve no substantial differences in principle is not only unwise, but is attended inevitably with embarrassments in the administration of the law."

If we substitute the word "cases" for the word "decisions" above, the language used is exceedingly appropriate to the cause under consideration.

In an effort to distinguish this case from that of *Brooks vs. Martin* the circuit court of appeals have taken a number of

positions which seem to us to be legally untenable. It is said in the first place (record, vol. 2, p. 599):

"No court will lend its aid to a man who founds his cause of action upon immoral or illegal acts. If, from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa* or a transgression of a positive law of the country, then the court says he has no right to be assisted."

Again :

"The fraud, if any, in the present case was in withholding the truth—in fraudulently representing and holding themselves out to the committee and to the public as rival bidders, when in fact they were not." (P. 601.)

"In consideration of sharing in the profits, McMullen did not put in an honest bid. He put in a bid much higher than he would otherwise have done but for the agreement." (P. 603.)

Again :

"The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, but his case may be proved without reference to it, then he is entitled to recover." (P. 611.)

Again :

"The doctrine of *Brooks vs. Martin* and kindred cases is, and always should be, applied in cases where the fraud

complained of is between individuals, which does not in any manner affect the public interest." (P. 612.)

Again:

"This suit is brought for an accounting between the parties of the profits realized on the contract made with the committee for the city of Portland upon its award to Hoffman & Bates upon the bid of Hoffman. The foundation of the case rests upon the legality of that contract." (P. 614.)

Finally:

"If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. (*Hanks vs. Baber*, 53 Ill. 292; *Chace vs. Trafford*, 116 Mass. 532; 1 Am. & Eng. Enc. Law (2d ed.) 437). But it does not appear that any such admission has been made. No promise has been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought. This suit, as before stated, is for an accounting, and the amount found due in the circuit court was only ascertained, and could only be determined, by an investigation of the transaction between McMullen and Hoffman arising out of the contract with the committee. The relief prayed for required the court to investigate all of the various transactions of the parties from the beginning to the end, and adjust the differences between them. We are called upon to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils, and to help them make a just and equitable division. This is just what the courts in all cases of illegal contracts, agreements, or enterprises have universally refused to do." (P. 614.)

Reasoning from such premises, it is not difficult to see how it was that the court of appeals failed to follow the decisions of this court. There was at the outset of the opinion a misconception of the "cause of action." We have endeavored to show that petitioner's cause of action was a property right to certain assets in the possession of his asso-

ciate, the duty to pay over which grew out of the relation of the parties and Hoffman's implied obligation to discharge his trust. The cause of action did not rest upon anything illegal.

The court of appeals find that the fraud, "if any," lay in the misconduct of the parties in submitting bids on March 1, 1893, and, such being the case, it was essentially a past transaction, an "accomplished fact," which could not "be affected by any action of the court in this case," in the language of the opinion in *Brooks vs. Martin*. When the court made this finding, we submit they brought the case upon its facts squarely under this decision and those cognate to it, and the result subsequently announced was a clear divergence from the rule of this court.

The court of appeals lay down as cases in which a party cannot recover money connected with an illegal transaction the following :

1. Those in which the plaintiff is obliged to show the illegal contract or transaction in presenting his case.
2. Those in which he must make out his case through the medium of the illegal contract or transaction.
3. Those in which it appears he was privy to the original illegal contract or transaction.

The instance in which he may recover is said to be where there is a new contract, remotely connected with the illegal contract or transaction, and the right to recover is not dependent upon that contract, *but the case must be proved without reference to it.*

The second only of the above propositions is sound, and all the others are at variance with the decisions of this court which have been cited.

In *Brooks vs. Martin* the plaintiff was obliged to show the illegal contract, because it measured the amount of his re-

covery and was indispensable evidence. So, in many cases, although the plaintiff's cause is not grounded upon the illegal contract, he may have to resort to it in evidence for a like purpose, or to identify the subject of the suit, or to establish the time within which something was to be done. An unstamped deed, where a stamp is required, cannot be used to support a claim to the property attempted to be conveyed, but it may be referred to in evidence for a description of the property, or to show when possession of the premises commenced. It is therefore error to say that no recovery can be had where the plaintiff in making his case is simply required "to show" the illegal contract.

In every one of the cases cited it was made to appear, in one way or another, that the plaintiff was privy to an "original illegal contract or transaction," and yet a recovery was not precluded by reason thereof.

The single instance in which, under these rules, the court of appeals allow that a recovery may be had would have absolutely cut off all recovery in *Brooks vs. Martin*.

Now, these are general rules laid down by the court of appeals. Their effect is not solely to dispose of the pending case, but all cases of like character hereafter arising in the ninth circuit will be referable to them. They are wrong. They are inconsistent with the repeatedly expressed views of this court. As long as they stand their effect will be an actual embarrassment in the administration of justice. Take the pending case. The circuit court followed the decisions of this court. The circuit court of appeals say error was committed, and they lay down different principles. What choice shall the circuit court make in the next case of this sort which may come before it? What is another plaintiff in like case to do? This court lay down certain principles by which his property rights are to be governed. The only appellate court to which he has access of right prescribe other rules. Confusion promises to be inevitable, and it may be far-reaching, unless this court shall in the pending

case, or some other which may be brought, cause the matters to be certified up and correct the errors which have been committed.

It is said again that the doctrine of *Brooks vs. Martin* is applicable to "cases where the fraud complained of is between individuals, which does not in any manner affect the public interest." The court could hardly have meant to imply that the rule would not hold in cases where the public interest was affected, and yet that is the deduction to be drawn from the statement made. There is no such limitation in *Brooks vs. Martin*, and in the very nature of things there cannot be. Cases of this class are all referable to the question of public policy, and that means public morals, public health, the maintenance of a standard of integrity in the community. The fact that the public, rather than an individual, may be defrauded of a sum of money through some evil practice does not constitute the heinousness of the offense, but it is the practice itself. If, therefore, it can be possible the court thought they were not bound by *Brooks vs. Martin* because the city of Portland was financially concerned, an undoubted error was committed. Taking the term "public interest" in its proper sense, no case of this character could possibly arise in which that interest would not be affected.

To our minds, it is an entire misconception of the nature of the case to hold, as the court of appeals did, that the foundation of petitioner's case rested upon the legality of the contract between Hoffman and the city of Portland. Our reasons have been stated above.

It is seemingly conceded by the court of appeals that if Hoffman had admitted that he owed petitioner a specified sum of money, petitioner might have recovered it upon an account stated. On what theory? Solely on that of an implied promise to pay. But is not Hoffman's implied promise to account to petitioner, as his trustee, for petitioner's property held in trust just as available? If not, why

not? If petitioner had secured access to Hoffman's books and learned the state of the business and the amount due him as his half of the profits, can any good reason be assigned why he might not have sued Hoffman at law for money had and received to his use? He cannot be made to suffer because for want of this knowledge he was compelled to call on Hoffman for a discovery. His property rights do not stand or fall by reference to the form of action to which he was compelled to resort for their enforcement. If Hoffman's defense would not be available against the implied promise arising from an account stated, neither is it available here.

The petitioner did not require the aid of the matters found by the court of appeals to be illegal, and his case was not in anywise dependent upon such matters.

The court of appeals were in great error when they found that the relief prayed for called upon them "to investigate all of the various transactions of the parties from the beginning to the end;" "to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils."

It is true that in the bill of complaint allusion is made to the bidding as introductory of the contract between Hoffman and petitioner, but the allegations were purely by way of inducement. The bill would have been every whit as good without these allegations as with them, and petitioner would have omitted them had he foreseen in any degree the course subsequently adopted by Hoffman. When it came to the taking of the testimony petitioner opened his case by introducing the partnership agreement of March 6, 1893, and objected to all of respondent's evidence which

has relation to matters antedating the agreement. (Record, vol. 1, p. 172.)

The decree of the circuit court commences with a finding that on the 6th day of March this agreement was entered into, and then proceeds to dispose of the controversy with this date as the initial point. (Record, vol. 1, p. 92.) We submit that the petitioner was right in the course he pursued, and that the decree is well framed.

The petitioner did not call upon the court to examine any of the matters which the court of appeals find to have been noxious, nor did his right to recover depend upon them in any degree. He had made his case without reference to them. All the matters constituting the basis of the relief sought by petitioner were to be found in the books of account kept by Hoffman (just as was the case in *Brooks vs. Martin*), and ascertaining from the partnership agreement of March 6 that petitioner was entitled to half the earned profits, the rest was simply a proposition of mathematical calculation. Indeed, there was no real occasion for petitioner's offering the partnership agreement at all, for its terms and the fact that the parties had entered into it, as alleged in the bill, were admitted in the answer, so that the court need have looked to the books of account alone. And so far as the court of appeals were concerned, the results shown by the books appear in the record by an agreed statement of facts.

It was the respondent who brought into the case the matters which the court of appeals found to be fatal to the petitioner's right of recovery.

Welch vs. Wesson, 6 Gray, 505, presents an analogous case. The parties had engaged in a driving contest for a wager, and in its progress defendant wilfully ran down plaintiff and broke his sleigh. To plaintiff's action for damages defendant was allowed to prove that the parties were violating the law when the injury occurred. On appeal the court said :

"That he [plaintiff] had no occasion to show into what stipulation the parties had entered, or what were the rules or regulations by which they were to be governed in the race, or whether they were in fact engaged in any business at all, is apparent from the course of the proceedings at the trial. The plaintiff introduced evidence tending to prove the wrongful acts complained of in the writ and the damage done to his property, and there rested his case. If nothing more had been shown, he would clearly have been entitled to recover. He had not attempted to derive assistance either from an illegal contract or an illegal transaction. It was the defendant, and not the plaintiff, who had occasion to invoke assistance from the proof of the illegal agreement and conduct in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit. The plaintiff sought nothing of this kind, and the mutual misconduct of the parties in one particular cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another."

In *Armstrong vs. American Exchange Bank*, 133 U. S., 433, the court say, page 469 :

"An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case."

And in *Swan vs. Scott*, 11 S. & R., 155, 164, the rule is stated thus:

"The test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is, whether the plaintiff requires the aid of the illegal transaction, to establish his case."

Here petitioner made complete proof without reference to the alleged illegal transactions. He sought no aid from them and required none. So far as his partnership agreement is concerned, it was supported by his promise to per-

form services for the firm. So far as his right to share the profits earned by the firm went, his demand was supported by the services he had performed.

We trust we have made clear our contention that the decision sought to be reviewed is not in harmony with the decisions of this court. That the court of appeals may have undertaken to distinguish the case signifies nothing, unless their distinction is sound. If the facts of the case bring the rights of petitioner under the rules laid down by this court, and these rules would give a different result from that arrived at by the court of appeals, then, whatever ill-grounded distinctions may have been attempted, there is discord.

Supposing the work performed by Hoffman and petitioner under the principal contract which resulted from the bidding to have been tainted by the matters set up by respondent, these matters afford no ground for denying to petitioner his share of the moneys otherwise earned.

What has been so far written has had relation to the principal contract secured from the city of Portland under the bidding which has been referred to. In the partnership contract of March 6 Hoffman and petitioner agreed that if they should do other work for the city of Portland they would share equally its profits and losses. The circuit court found (record, vol. 1, pp. 94-'5) that the parties had earned and Hoffman had been paid "for extra work \$14,496.74;" that there had been earned, as "profits of camp, store, sale of live stock, interest, etc., \$15,339.76;" and that Hoffman was in possession of the following assets, of which he and petitioner were joint owners, viz: "Plant and tools, cost price, \$6,234.60; furniture and fixtures, cost price, \$187.85; camp fixtures, cost price, \$1,246.16; miscellaneous accounts, \$188.75; disallowed

claim against the city of Portland, \$16,961.25." The latter item is for extra work and is identical with that of \$14,496.74 above. (Record, vol. 1, p. 93.)

These findings have never been disturbed, but, on the contrary, in an agreed statement of facts entered into for the purposes of the appeal, it is stipulated (record, vol. 1, p. 119) that there was earned, as "extra work not under contract, \$14,496.74;" that "during the progress of said work a store was kept and laborers were boarded, from which and other sources a profit was realized amounting to \$15,339.76;" that Hoffman claimed to have performed other extra work and furnished other materials, for which he claimed compensation, but which claim had not been allowed by the city, and "that the amount so claimed and rejected by the city is about \$17,000." There is no dispute about these facts.

These earnings did not result from the work performed under the bidding, or from the contract which was awarded Hoffman; and granting, for sake of argument, the full measure of respondent's contention in regard to that work, we ask what good reason can be assigned for refusing to give petitioner his just share of these assets? Yet the circuit court of appeals have allowed respondent to appropriate the whole of them. Clearly these matters are separable from the work done under the principal contract, and they are not affected by any taint which may by possibility be found to impair petitioner's right to recover his interest in the results of that contract.

The petition for the writ which we have submitted assigns other grounds of error. Petitioner was unwilling to allow the matters to which they are addressed to go unchallenged, but we forbear any discussion of them, as they do not constitute the substantive ground of the petition. It may be remarked in passing, however, that there is a marked difference of opinion between the circuit court and the court of appeals concerning the matters to which these exceptions are taken.

The decision of the circuit court of appeals should be corrected because it is not in harmony with the decisions of this court, and because petitioner has a right to invoke the rules laid down by this court for the protection of his property interests.

In cases of this character, the jurisdiction of the federal courts depending on diversity of citizenship, the decisions of the courts of appeal are final, and if they are erroneous the only way to correct them is through the medium of the writ now sought.

It seems entirely clear to counsel for petitioner that the decision sought to be reviewed establishes for the ninth circuit, in cases to which it may be held applicable, a different rule from that laid down by this court as governing such cases, and that it ought to be corrected as misleading. It is for just such purposes as this that the writ was provided by Congress.

We have found no instance in which the writ has been applied for on the score of lack of uniformity between the decision sought to be reviewed and the decisions of this court. It was held in *Columbus Watch Company vs. Robbins*, 148 U. S., 266, that the fact that the circuit court of appeals for one circuit had rendered a different judgment from that of the circuit court of appeals for another circuit under the same conditions might furnish grounds for the allowance of the writ. In *Forsyth vs. Hammond*, 166 U. S., 506, the writ was allowed because of a disagreement of the circuit court of appeals and the supreme court of the State, sitting within the same circuit. And in *Phenix Insurance Company vs. Steel, Administrator*, in 1893, from the ninth circuit, the writ was allowed on the grounds of lack of uniformity between federal courts, as between each other and with regard to State courts, and a difference of opinion between the judges of the ninth circuit over the question involved. On the final

hearing of the case last referred to there was an equal division of the court, and no opinion was rendered.

When the inferior courts do not follow the decisions of this court the power of correction exists, and there are the most imperative reasons for its exercise. This court is the supreme and central controlling influence over the whole federal judicial system, and when they have announced a rule of law as applicable to any case or class of cases, that rule should prevail everywhere as the law of the land. In this aspect the case presents a matter of public interest.

But if this court have laid down a rule protecting petitioner's interests in the matters in controversy, and he has been deprived of them by a want of adherence to that rule, he has a peculiar right to ask that the wrong done him by the decision of the court of appeals shall be undone.

It is submitted that this case furnishes an occasion for the interference of this court to correct the decision of the court of appeals, which is objectionable from a moral as well as a legal standpoint.

Respectfully,

WILLIAM A. MAURY,

R. PERCY WRIGHT,

L. B. COX,

Attorneys for Petitioner.



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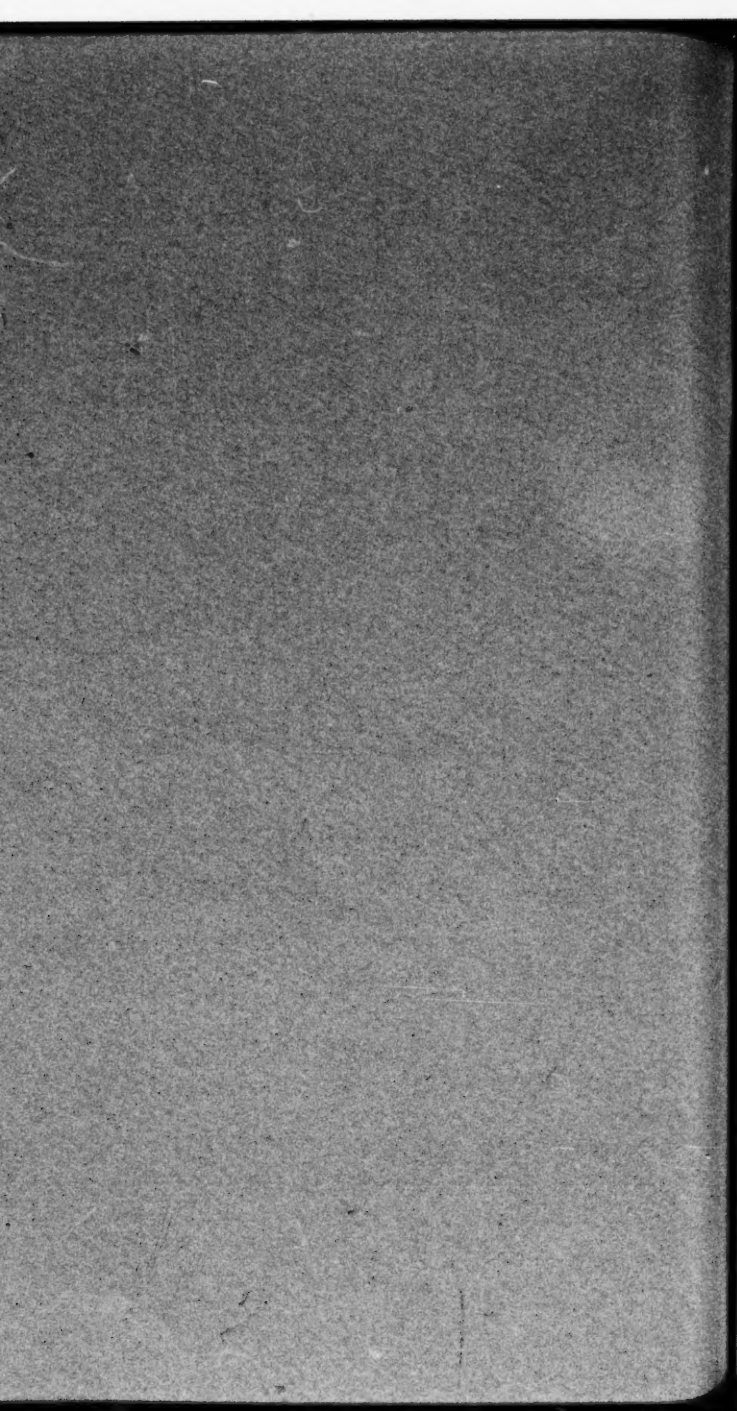
JOHN McMULLEN, PETITIONER,

vs.

JULIA E. HOFFMAN, EXECUTRIX OF THE LAST WILL
OF LEE HOFFMAN, DECEASED, RESPONDENT.

PETITIONER'S REPLY BRIEF.

R. PERCY WRIGHT,
L. B. COX,
WM. A. MAURY,
Attorneys for Petitioner.



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PETITIONER'S REPLY BRIEF.

Counsel for petitioner hardly deem it necessary to make reply to respondent's brief, interposing, as it seems to do, so little substantive ground of objection to the petition; but, although it so inadequately meets petitioner's argument, we do not wish to allow the positions taken to seem to stand as confessed.

We concede that the allowance of the writ here sought should be made only in cases of "gravity and importance," but we contend that the facts presented completely answer every requirement of this condition. We admit that the naked question as to whether respondent shall hold all the money in controversy in this suit or shall share it with

petitioner does not particularly concern any persons except themselves; does not present a case of general interest, and would not of itself warrant the allowance of our petition; but that is not the question presented for the consideration of the court, and the case is not to be determined upon any such circumscribed or false basis.

In *Lau Ow Bew's* case, cited in respondent's brief, the question whether or not he should be allowed to enter the United States or should be returned to China was one which directly affected him only, and this naked proposition would not have afforded sufficient ground for the allowance of the writ of certiorari which was applied for, but the larger question involved, viz., whether or not the acts of Congress and our treaty stipulations with China were being violated in *Lau Ow Bew's* case, was one of sufficient consequence to call for the relief sought. The object in view was to see that there was not a maladministration of the law, and *Lau Ow Bew* got his liberty as an incident of the proceeding. Just so here we complain that in *petitioner's* case the decisions of this court are not being recognized and followed in the ninth circuit, and this we present as the gravamen of our petition. Is it not a matter of "gravity and importance"? Could anything be of greater consequence or of greater public interest in the field of jurisprudence than the firm and inflexible maintenance and enforcement of the rules and principles of the supreme judicial tribunal of the land—than the uniform administration of the law? Could anything appeal more strongly to this court for the vindication of their own integrity and authority? There can be no question as to the gravity of the case presented and no room for the consideration of any proposition except as to whether or not the petitioner's contention is well grounded.

The petitioner does not at this time court any investigation of the facts of his case. He has noted his dissent from the conclusions reached by the court of appeals, but he has stated in his principal brief that he submits his petition upon the facts found by that court or upon any result of facts which might be drawn from the evidence by any reasonable construction. Consequently the suggestion made in respondent's brief to the effect that we are demanding the application of a different rule from that laid down by the court of appeals to a different state of facts from those found by that court has no place in the present discussion and need not be answered.

Counsel for respondent spend much time and space in presenting the case of *McBlair vs. Gibbes*, to which we made but incidental reference in our principal brief, and attempt in what seems to us a wholly unsuccessful way to distinguish the pending case from that of *Brooks vs. Martin*, upon which we do rely. Beyond this no effort is made to consider the authorities cited in our brief or to disprove their application to the points of this case.

There are two tangible propositions stated in respondent's brief (p. 8) upon which her whole case must stand or fall. It is said: "On the trial *the evidence disclosed the fact*, as found by the circuit court of appeals, that the contract which McMullen and Hoffman had with the city was procured by means that were illegal and fraudulent," and "that the fraud was in petitioner and Hoffman holding themselves out to said committee as rival bidders; that petitioner and Hoffman employed illegal means to obtain the award of said contract."

These are the propositions formulated in respondent's own language which are pertinent in our discussion. As a pri-

mary argument, we say it is not sufficient that " the evidence disclosed the fact " that the contract with the city was procured by fraudulent means. In cases of *par delictum* we understand the rule to be that the moving party cannot secure any affirmative relief against the other if he rests his demand upon a rotten foundation—if he must make out his case through the medium and by the aid of something which the law will not tolerate—and that if the plaintiff does not disclose the fact that his demand is thus infected the defendant may show that the plaintiff is dependent upon or " requires the aid of " *the illegal thing* as a condition of success. But this is a purely defensive weapon. Neither party can gain any advantage from his situation except by uncovering, when attacked by the other, the inherent weakness of his adversary's case. Neither can make a merit of their common state nor get any benefit from it except in this indirect way, and the salient vice of the decision which the petitioner seeks to have reviewed is that it was in nowise shown by either the petitioner or the respondent that the petitioner's case was dependent upon, or that he required the aid of, the matters which the respondent claims were fraudulent for the enforcement of his demand, and yet the respondent was allowed to make a merit of the common fraud (so found), and thus, independently of the necessities of the petitioner's case, to defeat his recovery.

A further answer to respondent's proposition is equally conclusive. The respondent, speaking in accord with the court of appeals, has located this fraud as resting in the action of petitioner and Hoffman touching the submission of bids and securing " the award of the contract. " For the sake of the argument, granting this to be true, the peti-

tioner contends that this was a distinctive "transaction," while the respondent insists it was an inherent part and parcel of the partnership agreement between Hoffman and petitioner :

"That it was as much a part of the real partnership agreement, although omitted from the written paper, that the parties should practice the fraud which the court has found was practiced in fact as it was to execute any part of the work if by means of the fraud the contract should be secured."

Brief, pp. 8, 9.

The respondent's proposition, then, plainly stated, is this: Hoffman and petitioner entered into a contract with each other embodying two covenants, one to practice a fraud upon the city of Portland for the purpose of securing the work under consideration, and the other to execute the work and divide the profits. The first, which is the objectionable one, the parties executed themselves without appealing to any court; the second, which is in itself unobjectionable, has given birth to this suit. Taking the engagement between the parties, as stated, the result is that as the case stood when the preliminary agreement for a partnership was entered into neither Hoffman nor petitioner could have been compelled to make the bid; but, having made it and thus performed the objectionable portion of the agreement, neither of the parties, as towards the city of Portland or as between themselves, could refuse to perform the valid portion of the contract.

With regard to the quotation from a letter which counsel for respondent print at this point, we feel warranted in saying from the record that it was written some five months

after the contract under consideration had been secured, had reference to another matter, with which Hoffman declined to have anything to do, the foundation for its introduction was stricken out of the pleadings by the circuit court, and it is not a legitimate subject for consideration in this connection..

We beg permission to say, that a fundamental mistake committed by the learned Circuit Court of Appeals lay in attempting to establish an identity between contracts to commit felonies and share the fruits thereof and contracts to do things not necessarily harmful in the particular case, but objectionable because of some tendency to induce a public inconvenience, as in this very case, where Hoffman's executrix is seeking to evade just responsibility by setting up illegality in the agreement with McMullen for procuring the contract with the City of Portland,—a contract which has proved beneficial to the City, and against which the City has never raised any complaint. The books are full of instances of such contracts, such as contracts to insure seamen's wages, contracts tending to create a perpetuity, contracts in restraint of trade, limitations of estates dependent on a certain person being raised to the peerage, and many others collected in the opinions in the celebrated case of *Egerton vs. Earl Brownlow* (4 H. Lds. Cas. 1).

These particulars have been entered upon in order to make more apparent the wide gulf that separates this class of contracts from that of contracts or conspiracies to commit felonies.

Failing to note this distinction, the Court below dignifies, by making a part of its opinion, the following extravagant attempt of the Supreme Court of North Carolina, in *King*

vs. Winants, (71 N. C., 469, 474,) to run a parallel between the two classes of contracts :

“Two men enter into a conspiracy to rob on the highway, and they do rob ; and, while one is holding the traveler, the other rifles his pocket of \$1,000, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a Court of justice hear them? No case can be found where a Court has allowed itself to be so abused. Now, if these robbers had taken the \$1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the Court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks vs. Martin*, *supra*, so much relied on by plaintiff.”

Common sense revolts at the bare suggestion, that *Brooks vs. Martin* and the supposed case stand on the same footing. The latter relates to a heinous crime, destructive of the public peace and the sacred principle of property—a crime leveled at the very fabric of government, and belonging to a class where the earlier law allowed no civil redress to the individual injured against the wrongdoer, and where the later law suspends the right to such redress until after the wrongdoer shall have been convicted or acquitted of the offense charged. (See *Higgins vs. Butcher*, *Yelv.*, 90*a*, note 2, *Metcalf's Ed.*, Andover, 1820.)

If now the offense to the party robbed, in the case supposed, became, at common law, drowned or merged in the “offense to the Crown,” it may well be questioned whether any action would lie by one participant in the robbery against the other for his share of the fruits of the crime, under any circumstances whatever, so long as the fruits could be traced.

In *King vs. Winants (supra)* the plaintiff and defendant agreed not to bid against each other for a government contract to be given to the lowest bidder, and to share the profits of the contract when given to one of them, and the contract having been awarded to the defendant it was held that the plaintiff could not maintain an action to bring him to an accounting for the profits, the contract being against public policy and void.

It is to be noted that the court were not unanimous, Rodman, J., having dissented on the grounds that "*this case cannot be distinguished from Brooks vs. Martin, 2 Wall., 70,*" and that "*the plaintiff can make out his case without going into proof of the fraudulent transactions.*"

Now it is in this case that we find the genesis of the idea, that before an action can be maintained, for the division of the profits of an illegal contract, by one party to the contract against another, there must have been some transformation of those profits into something different from what they were when first earned. Nor is it remarkable that a court, unable to perceive the difference between an action for the profits of a contract to commit a felony and one for the profits of a contract to do something not necessarily harmful or objectionable in itself, but having a tendency more or less detrimental to the public good, should have advanced this doctrine of transubstantiation, and then argued itself into the conviction that it was only enforcing the doctrine of *Brooks vs. Martin*.

The court below having been captivated by the parallel instituted by the North Carolina court between actions to share profits earned under contracts to commit felonies, and similar actions under contracts against public policy, natu-

rally fell a victim to the auxiliary doctrine of transubstantiation, and, as the former court had done, attempted to explain away *Brooks vs. Martin* and other decisions of this court of the same character.

It is true some of the scrip, in that case, had been regularly assigned by the soldier himself, or had been located on public land, some of which had been sold and conveyed away, and notes and mortgages taken for the unpaid purchase-money, but clearly these were *purely adventitious circumstances*, noticed, to be sure, by the court, but not entering into the *ratio decidendi* of its decision.

As this Court says, remarking on the case of *Tenant vs. Elliot* (1 B. & P., 3), "the plaintiff recovered, on the ground that the implied promise of the defendant arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction" (*McBlair vs. Gibbes*, 17 How., 232, 236), thus effectually disposing of the new-born theory that the fruits of an illegal enterprise must undergo some transformation before any duty to share them with another will support an action.

This single remark of the Court shows that if none of the circumstances in *Brooks vs. Martin* had existed the decision of that case must have been the same as it was.

Returning now to the case in hand, the moment the money earned by McMullen and Hoffman came into the hands of the latter, the law raised an implied contract in favor of McMullen to have his share of it paid over to him. This implied contract was wholly independent of the express contract, said to be infected with illegality, and made it entirely feasible for McMullen to bring Hoffman to an accounting, without invoking the so-styled illegal contract.

It is a *concessum* in the case that if Hoffman had admitted his liability to account to McMullen or had expressly agreed to pay him his share of the profits after receiving them, a bill, like the present one, would have been maintainable, which gives up the case, because the implied contract has all the potency of an express undertaking, being, as this court say in *McBlair vs. Gibbes* (*supra*), "*not affected by the illegality of the original transaction.*"

It is apparent, therefore, that our right to the *certiorari* is made out without controverting a single conclusion of fact deduced by the learned circuit court of appeals from the testimony—in other words, our application is not imperilled by admitting all the turpitude imputed to the transactions between McMullen and Hoffman with reference to obtaining and executing the contract with the City of Portland. It is thus gratifying to know, that the application may be allowed without the trouble of looking into the testimony.

In their review of *Brooks vs. Martin* and their attempt to distinguish it from the pending case counsel for respondent advance some very untenable propositions and some which are extraordinary. It is said (brief, pp. 12, 13) that there is presented "a condition so unlike the case now before the court as to make the rule there laid down inapplicable here. In that case the only illegal act was the purchase of soldiers' scrip. The act was illegal only because the statute authorizing the scrip to be issued and donating it to the soldiers declared that its sale should be void. * * * No element of public policy was involved in the act of purchasing the scrip. It was, nevertheless, an illegal transaction, because if entered into the law would not uphold it.

"The facts as they appeared in that case were that such

scrip was purchased in considerable amounts with money which Martin furnished, and was delivered to Brooks, the active member of the partnership. This purchase completed the illegal transaction. The title to the scrip, as against everybody but the soldier, was in the purchaser. Thus possessed of the property, Brooks proceeded by legitimate steps, in no manner connected with or dependent upon or in execution of the illegal contract of purchase, to and did carry the scrip and the proceeds of the sale of it through, step after step, of lawful business transactions until considerable profits had been realized. He presented the scrip to the department at Washington, where the title was recognized in him, and warrants for the land to which the holder of the scrip was entitled were issued to him. These warrants were afterwards laid upon lands. The lands, many of them, were sold, money realized from the sale, and afterwards loaned on mortgages. Every step along the whole line, after the purchase of the scrip, was a legal and legitimate use of the money in the hands of the partnership, and the profits sought in that case to be recovered were the result of and had been realized from these legitimate transactions, every one of which, as has been stated, was independent of and unaffected by and in no way in aid of the execution of the illegal contract. To this state of facts the court laid down the rule in *Brooks vs. Martin*."

It seems to us it would be an exceedingly difficult matter to frame an argument so utterly irresponsible to the point sought to be established, and, indeed, every line and word of it supports the contention of petitioner and shows the controlling influence of *Brooks vs. Martin* upon this case.

It is said the only illegal act was the purchase of soldiers'

scrip; that it did not involve any element of public policy; that it was "an illegal transaction;" that every subsequent step was legitimate; that the use of the moneys derived from this illegal source was lawful, and that the court was properly invoked to decree its distribution between the parties.

With this analysis of and comment upon *Brooks vs. Martin*, counsel for respondent urge that it is not applicable to the pending case!

The effect of the act of Congress declaring that sales of scrip were void was to make such sales unlawful, and Mr. Justice Miller says that "the traffic in which this firm engaged" was "illegal." Therefore both the partnership agreement and the operations of the firm were unlawful. The subject of their operations, out of which they made their profits, was under the ban of the law. The parties were violating public policy and it was involved in the case, for every infraction of law is obnoxious to public policy. The acquisition of their stock in trade is characterized by respondent's counsel as a "transaction" which did not affect their subsequent operations. All that is contended for by respondent's counsel in the pending case is that the stock in trade of the firm was acquired fraudulently, and yet it is urged that this factor is fatal to petitioner's right to recover, while in *Brooks vs. Martin* the same thing is of no consequence; that it is a "transaction" in the one case and a contract in the other.

The only distinguishing element between this case and that of *Brooks vs. Martin*, which is designated in respondent's brief, is that no public interest was involved in the operations of Brooks and his associates, the sale of the scrip

not involving any question of moral turpitude and being only forbidden by statute, while in the pending case the acts complained of are inherently wrong, and the general public is interested in them. The law is that the same general rule applies to both classes of cases, and this attempted distinction cannot be made good. The general public was interested in the violation of the law by Brooks and his associates. As well say that if A steals B's horse, or if A commits perjury against B on the trial of a case, the general public is not interested. B has lost his property in the first instance and may have sustained pecuniary injury in the second, either of which may be made good to him by payment of the value of the damage he has suffered; but the public has an interest beyond that of B, viz., in the maintenance of order and the welfare of society; so in regard to the sale of the soldiers' scrip the public had an interest in the violation of the law, although the offense was not made infamous and no punishment was provided for its commission.

Placing respondent's construction upon the attitude of Hoffman and petitioner, which we adopt for the purposes of argument, but not otherwise, this case is absolutely undistinguishable from *Brooks vs. Martin*. In that case the partnership was formed to buy up soldiers' claims in violation of law, and was therefore a partnership created for the conduct of an illegal business, and every act (such as the conversion of scrip into warrants and the location of the warrants) performed by the partnership, down to the division of the profits, was in consummation and fruition of the illegal purchase of soldiers' claims. This court expressly recognized the illegal character of the transactions and expressly stated (opinion, pp. 78, 79, quoted in our principal

brief, pp. 8-10) that they would not lend their aid to either party in the execution of the illegal portions of their transactions, but it was held that when such illegal portions had been performed the division of the profits resulting therefrom, which were the common property of the partners, would be enforced. This was allowed on the principle, well stated in the brief of Mr. Carpenter in that case, that "the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction."

Now, in the present case, according to respondent's contention, there was a partnership formed to do an unlawful thing. This was accomplished when the bidding was closed, just as (according to their theory) the illegal thing in *Brooks vs. Martin* was accomplished when the scrip was purchased. The title to the city's contract, as against everybody but the city of Portland, was in Hoffman and petitioner. They went on and in a lawful manner performed the work covered by the contract and earned the money agreed to be paid therefor. There was nothing further unlawful in their agreement, nor was any illegal act performed in the execution of their work. How in the name of reason can it be consistently contended that when a like wrong had been committed in each case, according to the argument of counsel for respondent, the subsequent operations of the parties in the pending controversy were infected with illegality, so that petitioner cannot recover from respondent his share of the profits, while in *Brooks vs. Martin* the subsequent operations of the parties and Martin's right to recover his share of the profits were free from taint? How can it be said that in *Brooks vs. Martin* every one of "these legitimate transactions"

"was independent of and unaffected by and in no way in aid of the execution of the illegal contract," while in the pending case transactions every whit as legitimate *were* dependent upon, *were* affected by, and *were* in aid of the execution of the illegal contract? A position so inconsistent and illogical can stand no otherwise than as an absurdity. The only difference between the character of the subsequent proceedings in the two cases is that in the one *the nature of the case* called for the location of the warrants and the sale of the lands, while in the other *the nature of the case* called for the manufacture and laying of the pipes.

Following this attempted distinction, counsel for respondent drift of into confusion by arguing (brief, p. 13) that "if the course shown to have been pursued in securing this contract can have the aid of the courts to uphold it *and the contracts so secured can be enforced*," dire results will follow.

The matter of the enforcement of this contract (*i. e.*, the contract with the city) is not before the court. What the city might have done in withstanding both Hoffman and petitioner, if the matters urged by respondent were true, is a very different thing from what the respondent may do in a controversy with petitioner. In fact the city seems not to have been dissatisfied with the situation and did nothing but pay over the amount of money earned on the contract. This failure to discriminate between the attitude of the city and that of respondent is only a cause of obscurity and is a decided detriment, rather than an aid, in reaching correct conclusions upon the issues involved in the pending case.

We read in respondent's brief again (p. 14):

"The cases cited by counsel are those only in which the illegality complained of was the violation of some statute or some act of like nature."

This declaration betokens at least an indifference in examining the authorities cited in our principal brief which was not to be expected in a matter of such consequence.

In *Planters' Bank vs. Union Bank*, while the parties violated an act of Congress in dealing in Confederate securities, viewing the matter from the standpoint of the Government, their conduct was inherently wrong in that it lent aid to the enemies of the United States while a state of war was prevailing.

In *Railroad Company vs. Durant* there was a violation on the part of a quasi-public officer of the duties of a fiduciary position, whereby individual gain had accrued to himself.

In *Wann vs. Kelly* the parties had engaged in stock-gambling transactions.

In *Western Union Telegraph Company vs. Union Pacific Railway Company* the facts were nearly akin to those in Durant's case.

In every one of these instances there was a violation of public policy just as clear as it can possibly be claimed to exist in the pending case, and this violation was in nowise dependent upon the question of statute or no statute.

Counsel for respondent say again (brief, p. 13): "Not a case is cited by counsel for petitioner growing out of or based upon a state of facts bearing any near resemblance to the facts in the case of *McMullen vs. Hoffman*." It would be a sufficient answer to say that the facts of the pending case quite as nearly resemble those of the cases cited, as the facts in any of those cases (save two) considered together resemble each other, and yet the same rule was applied in them all. This is an argument which neither proves nor disproves anything. General principles are not dependent in

their operation upon the discovery of an identity of detailed facts or conditions. If this were so, we would have only the law of cases and not the law of questions.

In every one of the decisions of this court and of other Federal courts cited by us in our principal brief there was an engagement between parties involving an element of illegality, but in every one of them the moving party was allowed to recover on the ground that the parties themselves had passed the objectionable stage before coming into court, and it was no matter of pollution for the court to operate upon the other features of their relationship. This is a sufficient similarity of facts.

Counsel for respondent do not attempt to justify the opinion of the court of appeals or to demonstrate its soundness, but are content to refer to it (brief, p. 14) as presenting a case of *res ipsa loquitur*. In this position we fully agree with the counsel. In our view the decision stands entirely alone and cannot be supported. We have already pointed out our grounds of objection to the principles announced in the opinion.

With regard to what we have heretofore submitted touching the claims made by petitioner upon assets other than the immediate results of the principal contract, we simply say that we are fully conscious of the fact that these matters of themselves do not present a sufficient cause for the allowance of the writ.

But such cases are addressed to the discretion of the court, and we think that a legitimate consideration is that the result of the decision operates as an *absolute denial of justice* to the party complaining of it.

In this connection it may be added that the statements

made in respondent's brief as to these matters are not accurate. The item of extra work is not for work which is not "specified" in the contract, as stated on page 15 of their brief, but is for wood not "under" the contract, as is set forth in the stipulation of facts entered into between counsel for both parties, found on page 119, volume 1, of the record. These items have nothing to do with modifications of the principal contract, as is contended by respondent. The original contract price was \$465,667, the modifications increased it to \$509,825.22, and all the items under consideration are still outside of this figure. We quote from this stipulation of facts:

"That the total sum earned under said contract and the extra work required by and allowed for by the city is, viz: *under the contract*, \$509,825.22; *extra work not under contract*, \$14,496.74, making a total earned and allowed, \$524,321.96."

Following this is the stipulation that from the store, boarding camp, etc., a further profit of \$15,339.76 was realized, "making the total amount paid, added to the amount earned, allowed, and unpaid, \$539,661.72."

We respectfully submit to the court that the petitioner has made a good case for the allowance of the writ sought.

R. PERCY WRIGHT,
L. B. COX,
WM. A. MAURY,
Attorneys for Petitioner.

Prayer for Change of Venue

SUPREME COURT

Term held S. 1899.

UNITED STATES

October Term, 1898.

JOHN McMULLEN, *Petitioner,*

vs.

JULIA E. HOFFMAN, *Executrix of the*
Last Will of Lee Hoffman, deceased,
Respondent.

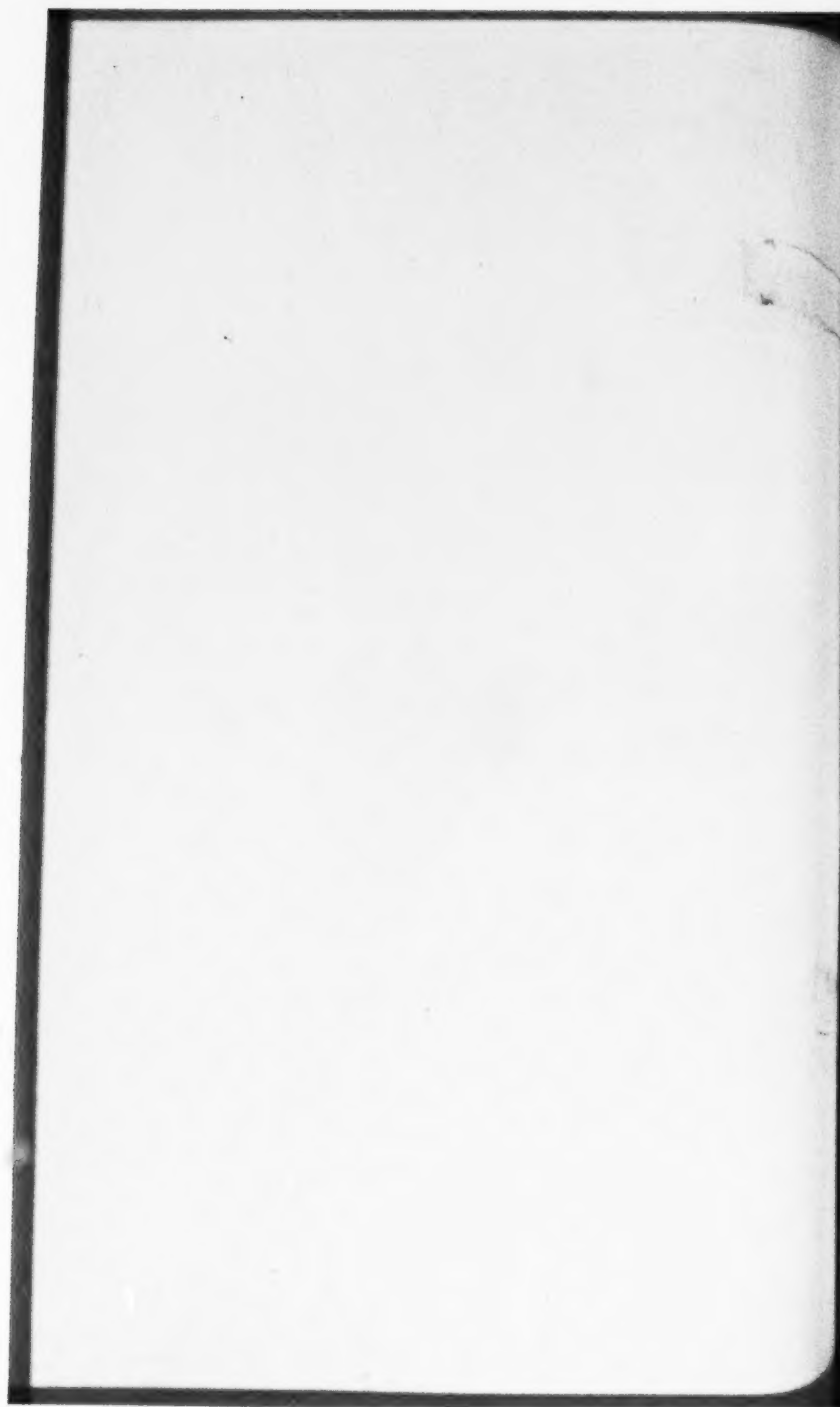
No. 271.

Brief of Petitioner.

WILLIAM A. MAURY,

L. B. COX,

Attorneys for Petitioner.



IN THE
SUPREME COURT
OF THE
UNITED STATES.

October Term, 1898.

JOHN McMULLEN, *Petitioner*,

vs.

JULIA E. HOFFMAN, Executrix of Lee
Hoffman, deceased.

No. 271.

Petitioner's Brief.

HISTORY OF THE CASE.

For some years prior to 1893 John McMullen, a resident of San Francisco and a citizen of California, was the president and general manager of the San Francisco Bridge Company, a private corporation of California, and Lee Hoffman, a resident of Portland and a citizen of Oregon, was engaged in business under the firm name of Hoffman & Bates. The business of both parties was that of general contract work. In 1887 the City of Portland had under consideration the construction of a new system of water works, and asked for proposals from contractors. McMullen was one of those who responded, and he bid successfully on some

part of the work. The enterprise was abandoned for the time being, but in contemplation of its renewal Hoffman then proposed to McMullen that when it came up again they should bid together on the work, and the subject was frequently discussed between them from that time until December, 1892. (Record, page 221.)

At this latter time the City of Portland again took up the project and advertised for proposals to be submitted March 1, 1893, separately on various branches of the work, the whole contemplating the bringing of water from a stream in the Cascade Mountains, known as Bull Run, to the city, a distance of some thirty miles, and there connecting with a general system for distribution. McMullen and Hoffman renewed their negotiations for joint action in bidding on this work. (See McMullen's testimony, record, pp. 210 et seq., 222 et seq.; Bush, p. 264 et seq.; defendant's exhibits A, B, C, D, E, Z, A2, B2, C2, D2.)

A few days prior to March 1, McMullen came to Portland from San Francisco, and he and Hoffman were engaged in the preparation of bids on the work. Bids were submitted by both of them—by McMullen in the name of the San Francisco Bridge Company, and by Hoffman in that of Hoffman & Bates—on all the parcels of work separately offered. On the item of "Manufacturing and Laying Steel Pipe from Head Works to Mt. Tabor," a bid submitted in the name of Hoffman & Bates was found to be the lowest, and "Hoffman & Bates" were found by the "Water Committee" of the City of Portland to be entitled to a contract for this work. On March 6, 1893, McMullen and Hoffman entered into this contract (record, p. 492):

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman & Bates have, with the assistance of said McMullen, at a recent bidding on the work of manufacturing and laying steel pipe from Mt. Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expects to enter into a contract with the Water Committee of the City of Portland for doing such work, the contract having been awarded to said Hoffman & Bates on said bid.

"It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom;

"And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland the profits and losses thereof shall in the same manner be shared and borne by said parties equally share and share alike.

"Witness our hands and seals this sixth day of March, A. D. 1893.

"JOHN McMULLEN. (Seal.)

"LEE HOFFMAN. (Seal.)

"In presence of:

"P. L. Willis,

"R. E. Sewall."

In reciting the transactions which antedate the execution of this contract, and in making reference to other branches of the work than that immediately involved in this suit, counsel for the petitioner do not wish to be understood as conceding their materiality on the appeal. The narrative is given because the matters appear in the record, and in order that the Court may have a prospective view of the points which are in contest between the parties. The petitioner contends that these matters cannot influence his right of recovery.

On March 10 the Water Committee of the City of Portland entered into a written contract with Hoffman for the execution of the work referred to in the agreement above set forth, the terms of which are embodied in a stipulation of facts herein as follows (record, p. 118):

"That on the tenth day of March, 1893, a contract was entered into between the said Hoffman and the water committee, Hoffman acting in the name of Hoffman & Bates, whereby said Hoffman undertook and promised to furnish all the material and labor for constructing and completing said pipe line from the head works at Bull Run to Mt. Tabor, according to certain specifications which were attached to and made a part of said contract, and to turn the same over completed to the City of Portland, in consideration whereof the City of Portland agreed to pay the sum of \$465,-667.00. The city, however, reserved the right to make any changes in the specifications it thought proper, the pay for the work to be increased or diminished as the change increased or diminished the cost of the work. Payments were to be made as the work progressed, monthly estimates to be made by the city engineer and

ninety per cent. of the amount earned under the contract in any one month was to be paid by the twentieth day of the following month. It was further provided by the said specifications that said Hoffman should turn said work over to the city when completed, and should keep the same in thorough repair and guarantee the city against all loss, costs or damages from breaks or leaks for a period of six months after the water should have been running full pressure through the whole length of said pipe, and in case said Hoffman failed in this, the city reserved the right to do the work and deduct the costs from the money retained in the hands of the city, and that when the said work was finally accepted the whole amount then due for said work should be paid."

Outside of the written contract between McMullen and Hoffman, it was agreed by them that Hoffman should act as superintendent of the work to be performed by them, and thereupon they began the prosecution of the work, Hoffman on the ground and McMullen contributing towards its advancement from San Francisco. Before estimates of sufficient amount to carry the work began to be received from the city, both parties were required to make advances of money, and this condition continued through the summer of 1893. Hoffman's advances were larger than those of McMullen, the latter asserting that he was so embarrassed by the financial disturbances of that year that he was unable to contribute towards the work in equal proportion with Hoffman. This situation of affairs provoked remonstrances from Hoffman and demands upon McMullen for the payment of his proper part of the necessary advances. Several letters were interchanged between them on the subject, and finally Hoff-

man wrote McMullen the following letter (record, p. 579):

"Portland, September 11, 1893.

"J. McMullen, Esq., San Francisco.

"Dear Sir:—The water works contract is very much mixed up. Last Thursday the committee held a meeting and called me in and there told me they had no money to pay me on the twentieth of this month, and told me they did not know if they could sell any bonds at all or not, and I could keep on or stop, just as I choosed to do. I insisted that it was for them to say if I should go ahead or not, as they had a right to stop the contract, but I did not, as it would involve me with my sub-contractors, but they would not tell me to stop, so had to keep on. Our estimate is \$66,000.00, and they have \$40,000.00 that they are going to divide equally among all the contractors, so we will get about \$20,000, and after paying Wolff & Zwicker and Cook and Kiernan their pro ratio, we will have about \$9,000.00 left to pay about a \$22,500 pay-roll, station men included, besides iron gates and supplies besides this month. Now, Mac, I am compelled to insist that you raise your portion of this money, as I will absolutely not carry this work any longer this way. You will either have to put up your share of the money, or let go of the contract, as you agreed to do. I have held off as long as I could with the hopes that I could swing it alone, but I cannot do it any longer. I don't want you to think that I am taking advantage of hard luck you are in but you can see the necessity of having money. If you will furnish \$10,000 by the twentieth, I will carry on the contract the same way I did before, but this amount I must insist on your furnishing or

you must let go, and I will get some one in that will furnish part of the money. I still think we will make some money. We are not going to make very much, but we will make some if we don't have too many leaks after we get the water turned on. Now, Mac, I don't want you to think that I want to take advantage of you, because I don't, and if it was you that was doing this work and I could not do my share I would not ask you to do for me. If I could do this alone I would, but I absolutely can't do it. Please let me hear from you at once, as I must do something with this work before pay day.

"Yours very truly,

"LEE HOFFMAN."

McMullen answered this letter by the following one (record, p. 558):

"San Francisco, Cal., September 14, 1893.

"Mr. Lee Hoffman, Worcester Blk., Portland, Oregon.

"Dear Sir: Your letter of September 11th at hand and noted.

"My idea of the proper solution of the financial difficulty of the pipe line contract (assuming that the committee will be unable to sell more bonds, and that they will be out of cash, which we do not understand is a certain thing yet, as we understand that they have extended the option of purchaser to October 1st), would be: to deduct the board bill from the pay-roll, which would leave the latter in the neighborhood of \$15,000.00; apply the \$9,000.00 to liquidate this; take, say

\$10,000.00 in bonds, get a loan of say 75 cents on the dollar on this amount of bonds and liquidate balance of pay-roll; stand off supply accounts entirely, as it is a perfectly fair proposition so to do in view of the fact that the city has not paid you, and no reasonable business man would object. If you have freight bills or contract obligations to meet, which could not be stood off, would advise taking further bonds and hypothecating them as above suggested, and meet such obligations. As I understand contract Wolff & Zwicker and Cook and Kiernan they can only demand pay as we receive it from the city, and not otherwise. There is not any doubt but that ultimately the city will succeed in selling these bonds, and probably in sixty or ninety days, at which time you could turn the bonds into cash; have it so understood with the water committee that the bonds you thus accept temporarily shall be turned in on the first sale of bonds. I think that with so good a collateral as these bonds there should be no trouble in raising money enough there to pay the balance of this year's labor. If there should be difficulty in this, you could shut down the work at the first of October, at which time the last option given on the bonds will expire. The difference between the interest that the bonds would bear and what you have to pay for money could not amount to a very considerable sum for the limited quantity that would be required to take care of the labor account for a month or two. I have not the slightest doubt but what these bonds will be marketable shortly, and trust that the committee will yet realize by the first of October.

"My own finances are in such a condition that it is absolutely impossible for me to comply with your request to furnish you \$10,000.00 before the 20th of this

month. Neither can I accede to your proposition that I should withdraw from and surrender my interest in this contract. Neither have I ever intimated in any way that I would do so, as you imply in your letter, except in my letter to you of March 14, 1893; to the proposition contained in said letter I am still open; or if you desire to make me an offer for my interest in this contract, I am open to the proposition.

"I think, Lee, that in your letter you considerably exaggerate the financial difficulties. I do not believe it will be long until the Committee will realize on their bonds, and for the inconsiderable sum it will require to take care of the labor, outside of the board account, I believe that you can readily secure a loan of 75 or 80 cents on the dollar for a block of these bonds, which the committee stand ready to give you on account of the contract. Neither do I believe that you would stand any loss on these bonds, as I think they will shortly be at a premium.

"Any reasonable or equitable arrangement that you may make, in this or any other direction for money, will meet my approval, and I will cheerfully bear my proportion of the interest, and for what additional money you may have in the contract more than I have contributed, I am prepared to pay any reasonable interest.

"It looks to me very much as if, should the committee be in funds again, the job would be on velvet by the end of this year; that is, that your receipts would be quite up to your disbursements. I would be glad to know if you agree with me in this.

"I have heretofore offered you the credit of the San Francisco Bridge Company to assist you in making any

financial arrangement that you might desire, if the same would be of any value to you.

"I trust that things will look brighter shortly, and will be glad to hear from you further on this subject.

"Yours truly,

"J. McMULLEN."

Hoffman's reply to this letter was the following (record, p. 580):

"Portland, September 16, 1893.

"J. McMullen, Esq., San Francisco.

"Dear Sir:—Yours of the fourteenth at hand and contents noted. Now, Mac, there is no use for you to tell me how to do business. I have done business here for a number of years to suit me and shall keep on if possible. It is all very well to tell me what to do if you are in S. F., but I am here and know just what is wanted. Now, I want to tell you once for all that unless you put up your share of the money, namely, \$10,000, by the 20th of this month, I shall not recognize you in this contract after that date and shall make such arrangements as I see fit. If the San Francisco Br. Co. has got the credit you claim it has, and I have no doubt but what it has just got what you say it has, San Francisco is the place for them to raise money to carry on their portion of this work. You seem to raise money enough to carry on the Spokane and Yakima work, but you can do nothing for this. Now, there is no use of our talking this matter over any further. I have told you what I want you to do. If you want to take this work and run it, you can do so. I will put up my portion of the

money. But I draw the line on that. Hoping to get your share of the money by the time specified, I am

"Yours very truly,

"LEE HOFFMAN."

McMullen made this response (record, p. 560):

"San Francisco, Cal., September 18, 1893.

"Mr. Lee Hoffman, Worcester Blk., Portland, Oregon.

"Dear Sir: Yours of September 16th at hand and noted.

"Before receiving the same, Captain Taylor, of the Risdon Iron Works, had showed me a letter he had received this morning from Mr. Failing, chairman of the water committee, saying that they had sold another \$100,000.00 worth of bonds, and that the money would be there not later than the 30th—probably several days sooner.

"I should have supposed that you, too, would have been advised of this fact, as his letter was also written on the sixteenth.

"This will undoubtedly make the financial situation very much easier than you anticipated. If you get an estimate of \$66,000.00, I suppose about one-half of it goes to Wolff & Zwicker and Cook and Kiernan on their sub-contracts; perhaps a little more; the other half of it should be abundant to liquidate your \$22,500 pay-roll (in which latter I understand there is included the board account which must amount to \$6,000.00 or \$7,000.00 which, according to my ideas of business need not neces-

sarily always be cash every month), but assuming that it is cash, it would still leave you in the neighborhood of \$10,000.00 to pay for other supplies with, or to reduce the amount of money that you have invested in the contract.

"You say that you have done business for many years to suit yourself, and will keep on doing so. Now, Lee, I have never made any reflections on your methods. Several months ago, before we started on this work, I told you my ideas of how to conduct it and, with all due respect, I still think I was pretty near right in it. I think you should have made everybody who furnished any supplies for that contract wait for their pay until we got it out of the job; that is, until those supplies were allowed for in the estimate. I have a job here, amounting to a quarter of a million dollars, and every subcontract on it is made on exactly these lines, and you know very well that all large works, works of magnitude, are conducted on these lines. When a party having a contract has a reasonable credit, there is no trouble in placing subcontracts and supply purchases on this basis, and we recognize the fact that your firm had an excellent credit. You elected to differently. You elected to make contracts, and allow people to draw on you when the goods were shipped. Now, of course, if you pay for everything in advance, it may take \$100,000.00 to run that job, but it does not follow that the job could not have been successfully run on \$10,000.00 or \$15,000.00.

"I hardly expected such a proposition from you, Lee, that you would refuse to recognize me in the contract if I did not do thus and so. You must understand that nothing that you can do will change my

rights in the premises, and if you attempt anything of the kind you will only injure yourself. If I were in a 'kicking' mood and wanted to find fault I might have as much reason with some things that you have done in connection with that work as you have to upbraid me for my shortcomings, but I have no desire to re-criminate.

"I trust that on more mature reflection, and with the better outlook from the financial horizon, you will see the folly of the proposition that you put forth in your letter.

"I assure you, Lee, that you will have no occasion when you get through to have any misunderstanding or row with me, unless you persist in making one; if you do, I shall have to accept the situation.

"Yours truly,

"J. McMULLEN."

After the interchange of these letters communication seems to have been suspended between the parties in regard to the prosecution of the work, except that McMullen visited Portland and conferred with Hoffman in regard to the work (McMullen's testimony, record, pp. 215-217, 224), and inspected the work at divers times afterwards. (McMullen's testimony, record, p. 168; Bush, p. 273, 291.)

After September 20, 1893, Hoffman, assuming to act alone, carried the work to a completion, and, as it eventually was ascertained, according to the books kept by himself, a net profit of \$105,039.59 was made, besides which there were some disallowed claims (record, p. 119), and some accumulation of merchandise and equipment.

On December 1, 1894, the work was substantially completed, and a few days later McMullen, who had no account of the operations, demanded of Hoffman a statement of the result and payment of half of the net profits. Hoffman denied the application, and on April 19, 1895, this suit was brought in the Circuit Court for the District of Oregon.

THE BILL.

It is alleged in the bill (record, p. 4) that prior to March 6, 1893, the City of Portland, acting through its Water Committee, advertised for proposals for the construction of a system of water works; that before the time specified for the acceptance of bids it had been agreed between Hoffman and McMullen that they would jointly endeavor to obtain a contract for the work, or some part of it, and that in their joint interest a bid should be put in for the construction of all, or portions, of said work; that if they were successful they would share equally in such contract as resulted from their bid; that pursuant to said agreement, and in the joint interest of the parties, a bid was put in by Hoffman in the firm name of Hoffman & Bates, for the manufacture and laying of steel pipe from the head works of the water system to Mt. Tabor, which bid was found to be the lowest bid for this work, and the defendant was declared to be the successful bidder and entitled to a contract with the City of Portland; that thereupon the parties entered into the contract on the sixth of March (hereinabove set out); that on the tenth of March, 1893, Hoffman, acting in the name of Hoffman & Bates, and in the joint interest of himself and

McMullen, entered into an agreement with the City of Portland (above mentioned); that upon the execution of the contract with the city Hoffman and McMullen proceeded with the performance of the work, and on or about the first day of January, 1895, completed the same and delivered it to the City of Portland, which received and accepted the work, subject to the obligations imposed by the contract as to the maintenance of the pipe for six months after the date of acceptance; that towards the execution of said work McMullen had contributed valuable services of himself personally and of his employes and agents, and had contributed money and property towards said work to the value of \$2,414.46, or thereabouts, and had been at all times ready and willing to render, and had rendered, all services in the conduct and management of the business requested of him by Hoffman, and had been ready and willing to render any other service required or desired of him towards the prosecution of the work; that Hoffman had contributed services and advanced money and supplied equipment for the prosecution of the work, but the amount of the advances and equipment and the value of his services McMullen did not know and could not state; that other work had been done by the parties towards the bringing of Bull Run water to Portland in connection with their principal contract; that the City of Portland had paid ninety per cent. of the contract price for the work done under the contract, and was withholding the additional ten per cent. until compliance was made with the guaranty in the contract as to keeping the pipe in repair for six months from the date of the completion of the contract; that complainant was informed, and therefore alleged the truth to be, that Hoffman had been paid in large part, if not

wholly, the cost and value of this additional work; that various modifications had been made in the principal work disarranging the contract price, but complainant could not state just what they were; that at the time the contract of March 6th was entered into it was understood and agreed between the parties thereto that within the State of Oregon Hoffman was to have and exercise personal superintendence of the work contemplated by the contract, was to manage all matters connected therewith, was to receive from the city all moneys to be paid, and disburse the same as might be required; that Hoffman did assume and exercise such superintendence and did make practically all purchases, employ all labor, and exercise general management within the State of Oregon over all matters connected with the work; that he had received all moneys paid by the city and had disbursed the same as far as needed, and that he had kept and then had in his possession full records and books of account; that complainant had during all of the time when said work was being prosecuted been a resident of San Francisco, and, with the exception of occasional visits to Portland and casual inspections of the work as it progressed, he had had no oversight of the work, and had kept no book of account; that he had no knowledge or information touching the amount or character of the work performed, outside of the contract of March 10th, or the value thereof, nor of the moneys which had been received or disbursed, but that all such matters would be shown by the books kept by Hoffman; that Hoffman had in his possession the several monthly estimates rendered by the engineer of the city, and that the final estimate would show all money earned and paid for the work performed for the city; that on or about the fourth of

December, 1894, at the City of Portland, complainant had requested of Hoffman an accounting of the transactions of the partnership, but that Hoffman had refused him any accounting, and had denied him access to the books kept by himself touching the work; that the complainant believed the city had already paid to Hoffman a sum of money exceeding by \$35,000.00, or more, all expenses and liabilities which Hoffman had made or incurred on account of the work, so that this sum stood as a profit on the contract, and complainant's part of the same should be paid over to him; that complainant believed the total profit made by himself and Hoffman upon the work done for the City of Portland was \$80,000.00, or more, one-half of which belonged and should be paid to him; that in addition to the direct profit made in money, Hoffman and complainant had other assets consisting of plant, tools and other personal property to the value of \$5,000.00, or thereabouts.

The relief sought by the bill was the appointment of a receiver to carry to final execution the work, and to receive from the city the retained percentage, to sell the partnership property at the completion of the work and reduce it to money, an accounting from Hoffman of the affairs and earnings of the partnership, and a payment of one-half of the net profits found to have been made on the partnership enterprise. The bill also prayed for the allowance of a restraining order inhibiting Hoffman from drawing from the City of Portland the retained percentage or from making any assignment of his right to the same, and from making any sale or other disposition of the remaining assets. Such application, including the prayer for the appointment of a receiver, was made to the Court on April 19, 1895,

and a restraining order was granted with an order to show cause. (Record, p. 19.) Upon the hearing the Court refused to appoint a receiver, and vacated the restraining order (record, p. 43), but subsequently modified its action so as to continue in force the inhibition against Hoffman's drawing from the city the retained percentage, or making any assignment of his interest therein. (Record, p. 46.)

THE ANSWER.

On June 3, 1895, Hoffman filed his answer (record, p. 28), in which he admitted that prior to the sixth of March the City of Portland had advertised for bids for the construction of its water system; that prior to the time prescribed for the reception of bids it had been agreed between him and McMullen that they would endeavor to obtain the contract for this work, or some part of it; but he denied that it was agreed that they would jointly endeavor to get such contract, but that, on the contrary, the agreement was that they should not act jointly in the matter, but severally, Hoffman acting in the name of Hoffman & Bates, and McMullen in the name of the San Francisco Bridge Company. Hoffman denied that it was agreed between McMullen and himself that bids should be put in for the construction of said water works, or for certain portions of them, but that it was mutually and secretly agreed between himself and McMullen before the bids were filed with the water committee that McMullen should make and file with the committee several bids for portions of the work in

the name of the San Francisco Bridge Company, and Hoffman should make and file several bids for the same portions of the work in the name of Hoffman & Bates, and that the bids should be made so as not to compete with each other, but to avoid competition; that it was further agreed, in order to effect the purpose of the parties and get a contract for the work at as high a figure as possible, that both parties, before said bids were filed, should examine the same and know their contents; that pursuant to such understanding McMullen did submit to Hoffman for examination and approval the bids which he proposed to file, and Hoffman submitted to McMullen for approval the bids which he proposed to file; that Hoffman disapproved of McMullen's bid, and required it to be raised by \$98,000 more than McMullen's proposed bid, which was done, and that McMullen disapproved of Hoffman's bid and required it to be reduced by \$13,000.00 below the sum which Hoffman had proposed bidding, and that the bids containing these new amounts were then filed, and Hoffman mutually agreed to share the profits and loss in the execution and performance of the contract; [that for the purpose of enhancing their profits it was further secretly agreed and understood, and they so contracted, that they should apparently compete for said work, but would not do so in fact;] that in inviting bids for the work it was divided by the Water Committee into distinct classes, and bids were taken on each branch of the work; that Hoffman and McMullen bid for various branches of work offered in apparent, but not actual, competition; that the figures stated in their respective bids were arranged so as to accomplish their agreement; that in case the bid of Hoffman & Bates for manufacturing and laying the pipe should be low-

est, and in case the bid of the San Francisco Bridge Company for furnishing the steel plates for the pipes should be lowest, and they should be accepted by the city, and the bid upon the last work by Hoffman & Bates should be next lowest, McMullen would decline to accept the work, and would thereby induce the city to accept Hoffman's higher bid, and the same course should be pursued with all other portions of the work upon which both of said parties bid; that it was one of the conditions of the bidding that each bid should be accompanied by a certified check equal to five per cent. of the amount of the bid, and that both Hoffman and McMullen deposited such checks with each of their bids; [that as soon as the bid of Hoffman & Bates for the manufacturing and laying of the pipe was accepted by the Water Committee, and for the purpose of carrying into effect the contract and understanding arrived at between Hoffman and McMullen, they entered into the agreement of the sixth of March; that each of the bids submitted by Hoffman and McMullen was in their joint interest, but Hoffman denied that one single bid was made in their joint interest.]

Hoffman admitted that pursuant to the agreement between himself and McMullen and in their joint interest, a bid was put in by him in the name of Hoffman & Bates for the manufacture and laying of steel pipes, which bid was found to be the lowest, and that upon the same a contract was awarded him; that in evidence of the interest between McMullen and himself in said bid, and the contract with the Water Committee to be entered into upon the same, and the work to be done thereunder, on March 6th he and McMullen entered into the written agreement mentioned by him, and that

said contract was a part of, and was made to aid in carrying out, the unlawful combination and confederacy entered into between himself and McMullen, as previously set forth in his answer. He admitted that on March 10th he entered into a contract with the City of Portland in pursuance of his bid, the same as was charged in the bill; he denied that upon the execution of the contract McMullen and himself had proceeded with the performance of the work therein contemplated, or on or about the first day of January, 1895, or at any time, had completed the same, but alleged that he alone proceeded with the work and completed the same, so that it was delivered to and accepted by the city, subject to the stipulation for six months' probation. He denied that towards the execution of the work McMullen had contributed valuable, or any, services of himself personally, or of any employe or agent, at any point, or that McMullen had contributed money or property, or anything else, towards the prosecution of said work to the value of \$2,414.46, or any amount, and denied that McMullen had at all times, or at any time, been ready or willing to render, or had rendered, any service in the conduct or management of the business, or any service which might have been required or desired of him, but alleged that as soon as the agreement of March 6th had been signed McMullen left the State of Oregon, and thereafter neglected and refused to render any aid, or to assist him in any way, in carrying out the contract with the City of Portland. He charged that he had been required to give to the City of Portland a bond with sureties in the sum of \$140,000, and although he had requested of McMullen a portion of the sureties, McMullen refused to provide them, or to aid him in any way in procuring the sureties; that it was

necessary to raise a large amount of money from time to time in the execution of his contract for the purchase of material and supplies and the payment of labor, and that he was without necessary means or resources to procure the same; that he had continuously apprised McMullen from time to time up to about September 16, 1893, of his circumstances and financial condition, and requested McMullen to furnish one-half of the money necessary for the successful prosecution of the work, but that McMullen had positively declined and refused to furnish any money to aid in the prosecution of the work, claiming that he had no money to put into the business, and by reason of said failure and refusal of McMullen to perform his part of the agreement of partnership, Hoffman, or or about September 16th, dissolved the same, and informed McMullen of said dissolution and of the termination of the partnership agreement; that McMullen had assented to the dissolution, and that thereupon the co-partnership was dissolved and terminated.

Hoffman further charged in his answer that McMullen entirely refused to furnish a surety upon the bond required of him, and refused to furnish his share of the money necessary to carry on the work, but complained of him (Hoffman) because he did not refuse to pay supply and other bills of expense incurred in carrying on the work, and had suggested that Hoffman should hold the creditors off, although Hoffman was under contract to pay for his supplies and labor at the end of each month, as McMullen well knew.

[It was charged that McMullen was desirous of securing other portions of the work, especially that of manufacturing and laying submerged pipe across the

Willamette river, and that he had proposed to Hoffman to devise some means to get the work against competing bidders; that they should pool their bids and take in the secretary of the Water Committee, and have him withhold certain bids until after the letting; that McMullen had also suggested the plan of a combination with two certain parties engaged in the manufacture of cast iron.]

It was further charged that on the sixteenth day of September, 1893, Hoffman had advanced of his own funds on account of the work \$15,990, and that on the twenty-fifth day of September bills on said work to the amount of \$22,500.00 would fall due; that on the eleventh day of September Hoffman had been notified by the Water Committee that it was without funds to pay the August estimates, and did not know when money for that purpose could be secured; that in order to meet the payments which would mature on September 25th, Hoffman had secured upon his own collateral and at considerable loss and sacrifice \$14,000.00, which would not have been necessary if McMullen had not refused to provide the money he had agreed to furnish. That Hoffman, at the request of McMullen, had purchased a certain plant at Seattle from the San Francisco Bridge Company, and bills for said plant, as well as for certain other equipment, had been rendered by that company; that Hoffman had tendered to said company payment for such bills, but that the company had refused to accept the same. Hoffman denied that he and McMullen had done other work in bringing water to Portland in connection with the principal contract; he admitted that 90 per cent. of the price under the principal contract had been paid him by the City of Portland, and

that ten per cent. was withheld during the six months' probation, and admitted that he had been paid a large part of the cost and value of other work performed for the city, but not the whole of it; he admitted that variations had been made in the specifications for all of said work, disturbing the contract prices, but said he could not state just what they were, nor their amount.

He admitted that when the contract of March 6th was entered into it was agreed between him and McMullen that he was to have within the State of Oregon personal superintendence and management of all the work done for the City of Portland, and was to receive all moneys paid by the city and disburse the same as required; he alleged that it was also agreed between himself and McMullen that he was to have and receive a salary for his services as such superintendent, and that a thousand dollars a month was reasonable compensation; he admitted that he had assumed and exercised personal superintendence of the work and had made all purchases, except that of a certain hydraulic punch and shears, which had been ordered by him and paid for by the San Francisco Bridge Company; he admitted that he had employed all the labor and exercised general management within the State of Oregon over the work, had received all moneys paid by the City of Portland and disbursed the same, as far as they had been disbursed, and that he had full records and books of account of all work done, material purchased, labor employed, expenses incurred, and moneys paid out; he admitted that McMullen was, during all of the time said work was being prosecuted, a resident of San Francisco, and, with the exception of occasional visits to the City of Portland and casual inspections of the

work as it progressed, had had no oversight of the work, but denied any knowledge as to whether McMullen had no book of account or record of the work, and denied any knowledge as to what McMullen might have known in regard to other work done for the city, but admitted that his own records and books fully showed the status of such work; he admitted that he had the several monthly estimates rendered by the engineer of the water committee, but denied that the last estimate showed all of the money earned or paid by the city; he admitted that on or about December 4, 1894, McMullen had demanded of him an inspection of his books and an accounting, and admitted that he had refused to render any account, or to allow McMullen to inspect his books, or any record, touching the work; he admitted that the moneys already paid to him by the City of Portland exceeded by \$35,000.00, or more, all expenses or liabilities which he had made or incurred on account of work done for the city, and that the same was expected profit on the contract. He denied that any part of these moneys ought to be paid to McMullen; he denied that he had converted all, or any, of said money to his own use, but admitted that he had refused, and still refused, to render to McMullen any account or payment, and he denied that McMullen had any interest in said work or its proceeds, as a partner; he denied that the profit made by himself and McMullen upon the work done for the city was \$80,000.00, or more, or any sum, and denied that McMullen had done any work for the city, but alleged that the only thing McMullen had done was to request him to go down on the Sound for a small remnant of a plant owned by the San Francisco Bridge Company, worth no more than \$1,062.82, and denied that one-half of \$80,000.00, or any part thereof,

belonged to, or should be paid to, McMullen; he denied that the assets of the partnership alleged by McMullen, in addition to the moneys paid and yet to be paid, consisted of plant, tools, or other property, to the value of \$5,000.00, or any sum. He admitted that he still had on hand a part of the plant with which the work had been done, but alleged the same was of little value, although he could not state its exact value. He denied that any receiver should be appointed, or that McMullen was entitled to any relief under his bill.

A number of exceptions were filed by the complainant to this answer (record, pp. 48, 51), which, after argument, were allowed in part and disallowed in greater part. The matter to which the exceptions were allowed is indicated above by bracket enclosures. In passing on the exceptions, the trial Court (Bellinger, J.) rendered a written opinion, which is found on page 58 of the record.

On July 21, 1895, Hoffman died, and on August 26th McMullen filed a bill of revivor against the respondent herein (record, p. 71), which was allowed on September 25th (record, p. 79), and thereupon McMullen filed amendments to his bill (record, p. 81), and a general replication (record, p. 85). The cause was referred to an examiner (record, p. 86), came on for final hearing before the Court on March 2, 1896 (record, p. 91), and on June 23 the Court rendered its decree (record, p. 91), given below:

FINDINGS AND DECREE.

"This cause came on to be heard on the second day of March, 1896, upon the issues joined by the pleadings and the proofs taken in support thereof, and was argued by counsel, and the Court not being advised as to what decree should be made in the premises took the matter under consideration until this day; and on this twenty-third day of June, 1896, the Court, having duly considered said pleadings and the evidence introduced in support thereof and the arguments of counsel thereon, finds therefrom as follows, to-wit:

"1. That on the sixth day of March, 1893, Lee Hoffman, since deceased, was entitled to a contract with the City of Portland, in the State of Oregon, for the manufacture and laying of steel pipe from the head works to a point designated as Mt. Tabòr on a system of water works then about to be constructed by the said City of Portland, and for furnishing material therefor, the price to be paid for the same being \$465,667.00; and on said day the said Lee Hoffman and the complainant entered into a written agreement, wherein for valuable consideration it was agreed by and between them that they would jointly execute the work to be done under said contract and furnish the material therefor, each contributing equally to the cost thereof and sharing equally the profits and losses which might result therefrom; and it was further agreed in said instrument that if either party thereto should get a contract to do, or should do, any other part of the work for bringing water to Portland, in connection with said system of

water works, the profits and losses of such other work should be shared by them jointly.

"2. That on the tenth day of March, 1893, a contract was entered into by and between the City of Portland and said Lee Hoffman, in the firm name of Hoffman & Bates, for doing said work and furnishing said material for the amount of money above specified, it also being stipulated in said contract that said City of Portland had the right at any time during the progress of the work to make necessary modifications of the plans, specifications and locations, and in such cases the compensation provided in said contract should be increased or reduced in proportion to the increase or reduction of expense resulting from such modifications.

"3. That the complainant at the time of entering into said contract was a resident of the City of San Francisco, State of California, and said Lee Hoffman was a resident of the said City of Portland, and it was further agreed between them that said Lee Hoffman should have and exercise the active superintendency of said work, but no agreement was entered into between them as to the amount of his compensation therefor.

"4. That upon the execution of the contract above mentioned between said Lee Hoffman and the City of Portland, and in pursuance of the contract between the said Lee Hoffman and the complainant, they, the said Lee Hoffman and the complainant, proceeded with the prosecution of the work contemplated to be done under the contract with the City of Portland, and to furnish materials therefor, said contract having been modified in divers particulars during its progress, the effect

whereof was to increase its expense; and, about and prior to the first day of December, 1894, the work to be done and material to be furnished under said contract as modified were completed, and there was earned on said contract the sum of \$509,825.22, of which there was paid to the said Lee Hoffman at divers times on and prior to December 20, 1894, the sum of \$458,842.70, and the sum of \$50,982.52 was withheld by said City of Portland, and less the sum of \$18,627.17 paid to Wolff, Zwicker & Buehner, as a debt owing from the complainant and defendant, as hereinafter mentioned, the same is unpaid, although earned and due; that the complainant and the said Lee Hoffman did other work and furnished other material in connection with said contract, for the purpose of bringing water to Portland, and thereby claim to have earned the sum of \$31,073.49, of which the City of Portland has allowed the sum of \$14,112.24, and has disallowed the sum of \$16,961.25. Of said sum of \$14,112.24 there was paid to the said Lee Hoffman at various dates on and prior to the twentieth day of December, 1894, the sum of \$11,848.81, and the sum of \$2,263.43 is now withheld by the City of Portland and is unpaid, although earned and due.

"5. That the said Lee Hoffman and complainant earned other moneys in the conduct of a camp and supply store for the laborers employed on the work by them conducted, and realized a sum of money on the sale of livestock owned by them and sold at the completion of said work, all of which moneys were paid to the said Lee Hoffman, and have ever since been held by him and the defendant, and no part thereof has been paid to complainant.

"6. That the said Lee Hoffman, during his lifetime, and the defendant, as his executrix since his decease, have denied to the complainant any and all interest in the contract between said Lee Hoffman and the City of Portland, and the work done and material furnished thereunder or in connection therewith and the moneys earned therefrom, as well as in the other work above mentioned as having been performed in bringing water to the City of Portland and moneys earned therefrom, and also in the other moneys realized and received by the said Lee Hoffman from the camp account and the store account and the sale of livestock above mentioned, and the said Lee Hoffman and the defendant have failed and refused to account to the complainant for any of said work, material, or moneys, although the complainant had demanded an accounting and settlement prior to the institution of this suit, but they, the said Lee Hoffman and the defendant, have claimed, and now claim, to hold all said moneys as their own.

"7. That the sum of one thousand dollars per month for the period of twenty months, to-wit, from the first day of May, 1893, to the first day of January, 1895, as charged and drawn by said Lee Hoffman, is proper compensation for his services for superintending said work, and the same is hereby allowed as a charge against the joint account in the settlement between the parties to this suit.

"8. That a full and true statement of the account between the parties hereto touching the work, material and operations above mentioned, and the moneys earned thereon, and showing the moneys which the

complainant is now entitled to recover from the defendant is as follows, to-wit:

Total allowed and received from the City of Portland.

On contract	\$509,825.22	
For extra work.....	14,496.74	
	<hr/>	\$524,321.96
Profits of camp, store, sale of livestock, interest, etc., etc.		15,339.76
		<hr/>
Grand total		\$539,661.72
Total gross cost of work, in- cluding salary of \$20,000 to Lee Hoffman.....		\$434,622.13
		<hr/>
Balance		\$105,039.59
Amount retained by City of Portland,		
On account of contract.....	\$ 50,982.52	
On account of extra work...	2,263.43	
	<hr/>	\$ 53,245.95
Less amount paid to Wolff, Zwicker & Buehner.....		18,627.17
		<hr/>
Now held by City of Port- land		\$ 34,618.78
Amount drawn out by Lee Hoffman and defendant..		72,737.70
		<hr/>
		\$107,356.48
Amount to be paid to San Francisco Bridge Co.....		2,316.89
		<hr/>
Balance as above.....		\$105,039.59
One-half thereof owing com- plainant		\$ 52,519.80

"9. That in addition to the moneys above mentioned the complainant and defendant are the owners jointly of the following assets, the true present value of which has not been shown, to-wit: Plant and tools, cost price, \$5,234.60; furniture and fixtures, cost price, \$187.85; camp fixtures, cost price, \$1,246.16; miscellaneous accounts, \$188.75; disallowed claim against the City of Portland, \$16,961.25.

"Thereupon, in consideration of the premises, it was ordered, adjudged, and decreed as follows, to-wit:

"That the complainant and said Lee Hoffman were partners in the contract between said Hoffman and the City of Portland, and in all the matters and things hereinbefore set forth, and the complainant as such partner, is entitled to an accounting with the defendant as to the receipts and disbursements of the moneys paid or to be paid by the City of Portland on account of its contract with said Lee Hoffman, and the work performed and material furnished by the complainant and said Lee Hoffman thereunder, or in connection therewith, as well as other work done for the purpose of bringing water to the City of Portland, and also as to all the other operations in connection with said work and the moneys received therefrom, as above set forth; that the complainant is a half-owner with the defendant of the plant and tools, office furniture and fixtures, camp equipment, and all other such property above mentioned, and that the same be sold and the proceeds be divided between the complainant and defendant; that the complainant is a half-owner with the defendant in whatever interest she has in the disputed claim of \$16,961.25 against the City of Portland above mentioned; that the defendant forthwith pay to the San

Francisco Bridge Company, out of the moneys in her possession drawn from the proceeds of said work, the sum of \$2,316.89; that the costs of suit of both parties, taxed at \$557.24, be paid out of the common fund, neither party recovering costs of the other, and that the complainant recover judgment against the defendant for the sum of \$52,241.18.

"It is further ordered that the provisional order of injunction heretofore issued against the said Lee Hoffman and continued against the defendant, inhibiting them from drawing from the City of Portland the moneys now held by it, as above-mentioned, be discharged in accordance with the stipulation of the parties filed herein."

Accompanying this decree was a written opinion found on page 96 of the record.

McMullen filed a cost bill in the trial court, found on page 104 of the record.

Both parties took an appeal.

RESPONDENT'S ASSIGNMENT OF ERRORS.

"First. In making findings numbered respectively 1, 2, 3, 4, 5, 6, 7, 8, and 9, and in making and entering the following decree in said cause on the twenty-third day of June, 1896, to-wit:

[The assignment proceeds with a statement of the findings and decree in extenso, just as printed above.]

"Second. It is respectfully submitted that error was committed in said court in said decree in ordering and decreeing that said complainant and Lee Hoffman were partners from the said sixth day of March, 1893, and continued to be such partners up to and until the said twenty-third day of June, 1896, and in decreeing that said partnership be then dissolved, and in decreeing that said complainant was and is entitled to one-half the profits of said contract, dated the tenth day of March, 1893, made by the water committee of the City of Portland with Hoffman & Bates for the manufacturing and laying steel pipe for conveying the water from Bull Run river from head works to Mt. Tabor, and of extra work done under and in connection with said contract and extra work not connected with said contract, and from camp stores and other sources connected with said work of manufacturing and laying said steel pipe. Because it appears in the answer filed in said cause and from the testimony in the record that said complainant committed a breach of his said agreement contained in said contract of March, 1893, between complainant and Lee Hoffman, and failed, neglected, and refused to pay his share of money necessary to carry on said contract of manufacturing and laying said steel pipe, and that in consequence thereof the said Lee Hoffman on the twentieth day of September, 1893, dissolved said partnership, and the same then ceased to exist, and the complainant thereafter took no part in conducting said business, and did not act in connection therewith, and was not thereafter recognized by said Hoffman as a partner therein. That from and after said date the entire control, management, execution and responsibility of said contract was upon the said Lee Hoffman and not upon the complainant, and that any profits

which may have been earned after the said twentieth day of September, 1893, belonged wholly to the said Hoffman, and did not belong to the said alleged partnership composed of the complainant and said Lee Hoffman. That if said complainant was entitled to any profits whatever as a result of said partnership they were such only as may have been earned between the said sixth day of March, 1893, and the twentieth day of September, 1893, and was not entitled to any profits earned after the last-named date.

"Third. It is respectfully submitted that error was committed by said Court in said decree in decreeing that said complainant recover judgment against the defendant for the sum of \$52,241.18; because it appears from the testimony in the record that of the \$105,039.59 profits of said alleged partnership no more than \$60,421.32 were ever paid or received by the said Lee Hoffman and the defendant. That at the time said decree was rendered, to-wit, on the twenty-third day of June, 1896, there were retained in the hands of the water committee of the City of Portland of earnings under said contract the sum of \$34,618.17, which has never been received by or paid to said Lee Hoffman or this defendant, as his executrix, and the complainant is not entitled to any judgment for any portion of said sum against the defendant.

"Fourth. It is respectfully submitted that error was committed by said Court in said decree in ordering and decreeing that the defendant forthwith pay to the San Francisco Bridge Company out of moneys in her possession drawn from the proceeds of said work the sum of \$2,316.89, because the testimony in this cause shows that the complainant claims the said sum of

\$2,316.89, as advanced by himself as his contribution to the execution of said contract between himself and Lee Hoffman under the said contract of March 6, 1893, and was not, and is not, due to said San Francisco Bridge Company, but to the complainant, and that no money whatever is due to the San Francisco Bridge Company.

"Wherefore, said defendant, Julia E. Hoffman, executrix, prays that the said decree and order be reversed, and that said Court may be directed to enter a decree in accordance with the prayer of defendant's answer to the petition herein, or such decree as shall be found to be according to equity under the evidence in this cause." (Record, p. 117.)

PETITIONER'S ASSIGNMENT OF ERRORS.

"First. Your petitioner respectfully submits that the court erred in making its finding of fact No. 7, the same being as follows. to-wit:

'7. That the sum of one thousand dollars per month for the period of twenty months, to-wit, from the first day of May, 1893, to the first day of January, 1895, as charged and drawn by said Lee Hoffman is proper compensation for his services for superintending said work, and the same is hereby allowed as a charge against the joint account in the settlement between the parties to this suit.'

"And your petitioner alleges that the evidence in said cause does not support the finding and determination of the Court that the sum of \$1,000 per month for the period of twenty months, as stated in said finding, was proper compensation for the services of said Lee Hoffman for superintending said work, and alleges that the sum of \$400 per month, and no greater amount, during said time is proper compensation for his said services, the same to be charged against the joint account in the settlement between the parties to the suit.

"Second. That the Court erred in making the eighth finding of fact set forth in said decree, to-wit:

'8. That a full and true statement of the account between the parties hereto touching the work, material, and operations above mentioned and the moneys earned thereon, and showing the moneys which the complainant is now entitled to recover from the defendant is as follows, to-wit:

Total allowed and received from the City of Portland,	
On contract	\$509,825.22
For extra work	14,496.74
	<hr/>
	\$524,321.96
Profits of camp, store, sale of livestock, interest, etc....	15,339.76
	<hr/>
Grand total	\$539,661.72
Total gross cost of work, including salary of \$20,000 to Lee Hoffman.....	434,622.13
	<hr/>
Balance	\$105,039.59

Amount retained by the City of Portland, on account of contract	\$ 50,982.52	
On account of extra work...	2,263.43	
	<hr/>	\$ 53,245.95
Less amount paid to Wolff, Zwicker & Buehner.....		18,627.17
		<hr/>
Now held by City of Port- land		\$ 34,618.78
Amounts drawn out by Lee Hoffman and defendant..		72,737.70
		<hr/>
		\$107,356.48
Amount to be paid to San Francisco Bridge Co.....		2,316.89
		<hr/>
Balance as above.....		\$105,039.59
One-half thereof owing com- plainant		\$ 52,519.80

That a full and true statement of the account between the parties hereto touching the work, material and operations above mentioned and the moneys earned thereon, and showing the moneys which the complainant is now entitled to recover from the defendant, is as follows, to-wit:

Total allowed and received from City of Portland...	\$509,825.22	
For extra work	14,496.74	
	<hr/>	\$524,321.96
Profits of camp, store, sale of livestock, interest, etc...		15,339.76
		<hr/>
		\$539,661.72

	<i>Brought Forward,</i>	<i>\$539,661.72</i>
Total gross cost of work, including salary of \$8,000 to Lee Hoffman		<u>422,622.13</u>
Balance		<u>\$117,039.59</u>
Amount retained by City of Portland on account of contract	\$ 50,982.52	
On account of extra work...	<u>2,263.43</u>	
Less amount paid Wolff, Zwicker & Buehner.....		<u>\$ 53,245.95</u>
		<u>18,627.17</u>
Now held by the City of Portland		<u>\$ 34,618.78</u>
Amounts drawn out by Lee Hoffman and defendant..		<u>84,737.70</u>
		<u>\$119,356.48</u>
Amount to be paid to San Francisco Bridge Co.....		<u>2,316.89</u>
Balance as above.....		<u>\$117,039.59</u>
One-half thereof owing complainant		58,519.80
Interest owing complainant at the rate of 8 per cent. per annum to June 23, 1896, date of decree, as below. Interest on half of \$4,800, excess drawn for salary on December 30, 1893, from said date		476.80

	<i>Brought Forward,</i>	<i>\$58,996.60</i>
Interest on half of \$7,200, excess drawn for salary on September 30, 1894, from said date		498.40
Interest on half of \$8,855.04 drawn January 31, 1895..		494.91
Interest on half of \$40,000, drawn June 17, 1895.....		1,626.66
Interest on half of \$10,000, drawn July 15, 1895.....		375.51
Interest on half of \$13,882.66 drawn August 5, 1895...		490.45
Interest on \$2,316.89, advanced by complainant to December 30, 1893.....		83.80
		<hr/>
		\$ 62,566.33
Less interest on \$17,609.91 advanced by Lee Hoffman from the several dates of advances to November 1, 1893		419.14
		<hr/>
		\$ 62,147.19

"Third. That the Court erred in decreeing that the costs of suit should be paid out of the common fund, and in not awarding to complainant judgment against defendant for his costs of suit.

"Fourth. That the Court erred in the decree rendered wherein it was found and adjudged that the complainant recover judgment against the defendant for the sum of \$52,241.18, and that the Court should have

found and adjudged that the complainant recover from the defendant the sum of \$62,147.19 and costs of suit.

"Wherefore, the above-named complainant prays that the judgment and decree rendered by the above-entitled Circuit Court of the United States for the District of Oregon may be reversed or modified by the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that the complainant may have a decree in this cause awarding him a judgment against the defendant for the said sum of \$62,147.19, or such sum as the said United States Circuit Court of Appeals shall deem him to be equitably entitled to recover from the defendant, together with his costs of suit, and that the said Circuit Court of the United States for the District of Oregon shall be directed to enter a decree in favor of the complainant in conformity with the decree and mandate of the said United States Circuit Court of Appeals." (Record, p. 125.)

On these cross-appeals the cause came on to be heard before Judges Gilbert, Ross and Hawley in the United States Circuit Court of Appeals for the Ninth Circuit, and on October 4, 1897, an opinion was rendered (record, p. 575), and a decree entered (record, p. 615), reversing the decree of the trial court with costs. McMullen filed a petition for a rehearing, which was denied on February 28, 1898, without an opinion (record, p. 617), and thereupon he sought and obtained a writ of certiorari from this Court.

BRIEF AND ARGUMENT ON RESPONDENT'S APPEAL.

For the sake of convenience and clearness we will present in the form of distinct briefs our views upon the appeals taken by each party from the decree of the circuit court for the district of Oregon.

The respondent offers two principal points as objections to a recovery by McMullen.

1. That the partnership engagement existing between McMullen and Hoffman was tainted with fraud *ab initio* in the matters charged in the answer, and consequently the court will decline to entertain the suit, or to give McMullen any relief whatever.

2. That conceding the relationship of partners to have been established between McMullen and Hoffman by the contract of March 6, 1893, Hoffman dissolved the partnership for cause on September 20, 1893, and because of such dissolution McMullen is not entitled to the relief prayed in his bill.

McMullen responds to the first ground of defense in effect by demurrer and by the joinder of issue. Conceding, for the sake of argument, that the charges of fraud are well grounded and are sustained by the evidence, he insists that the de-

fense is unavailing to the respondent; but, in point of fact, he absolutely denies these charges and the sufficiency of the evidence to establish them. In answer to the second point, McMullen denies that Hoffman terminated the partnership on September 20, 1893, or that he had any power to terminate it.

Statement of the Attitude which McMullen and Hoffman Occupied Towards the Matters In Suit.

Without at this time entering upon disputed or debatable ground, we think it will be helpful to the court to state the attitude which McMullen and Hoffman sustained towards each other with reference to the matters in suit. We think no issue will be taken with us by counsel for respondent as to the accuracy of the statement which we shall subjoin, but the statement will be taken with the qualification before noted, that our contention is that whatever transpired between the parties prior to their partnership agreement of March 6th cannot influence McMullen's right to recover in this suit.

We therefore assert:

1. That it was the agreement between McMullen and Hoffman that they would co-operate in seeking to get a contract from the City of Portland, and that they never intended to oppose each other.

2. That the successful bid submitted by Hoffman for the work, which is the principal feature of the pending controversy, was submitted in the joint interest of himself and McMullen.

3. That there was nothing inherently fraudulent or wrong in connection with this bid, separately considered.

4. That the partnership contract of March 6, 1893, between Hoffman and McMullen, was in itself lawful, and contemplated the execution of work which was free from any imputation of illegality.

5. That the contract of March 10, 1893, between Hoffman and the City of Portland was for the performance of lawful work.

6. That the only imputation of fraud or illegality in connection with Hoffman's bid, is the contention made by respondent that it was coupled with a fictitious bid submitted by McMullen, which last bid had a tendency to mislead the water committee as to the advisability of accepting Hoffman's bid.

7. That as Hoffman and McMullen had never intended competing with each other upon the letting under consideration, their action in nowise savored of stifling competition or depriving the city of the advantage of an additional bidder.

Upon the first proposition stated Judge Bellinger made the following finding in his opinion (record, p. 99):

"In this case the uncontradicted fact is that McMullen did not intend to bid for the work in question otherwise than jointly with Hoffman; that he came from San Francisco to bid with Hoffman, not to compete with him, and that this was in pursuance of an understanding had between the parties long before. The agreement was merely to secure co-operation between the parties, and so far from tending to lessen competition, it tended to increase the number of bidders since it does not appear that either of the parties intended to bid or would have bid on his own account."

This statement is abundantly established by the evidence.

In a letter written by McMullen to Hoffman December 31, 1892, (defendant's exhibit A, record, p. 578) he says:

"As you are acquainted with all the Water Commissioners, and have social and business relations with many of them, I think you are in a position to counteract this movement, and if we are to make anything ultimately out of this job it will be necessary to knock out this scheme. Get in and do what you can to beat it."

In McMullen's letter to Hoffman of January 26, 1893, (defendant's exhibit B, record, p. 579) he says:

"I think you ought to make Wolff & Zwicker understand that YOU AND I ARE TOGETHER, and that we are going to hit the job hard."

In McMullen's letter to Hoffman of February 6, 1893, (defendant's exhibit C, record, p. 521) he says:

"Please send us strain sheets and blue prints of the plans of the bridges, including profile; also blue prints of the ball joints, and any other plans for the pipe line that they may have.

"I have sent three copies of the specifications to Mr. Catt, and instructed him to get cost of plant for manufacturing pipe, and also the cost of manufacturing pipe, together with the cost of lap welded pipe for the submerged portion; also cost of ball joints.

"I will probably be up there about the 25th of the month, at which time I will have a report from Mr. Catt on these things.

"I also have the old estimate, very full and complete, that we made five or six years ago—when the work was offered before."

In McMullen's letter to Hoffman of February 8, 1893, (defendant's exhibit D, record, p. 522) he says:

"I have made very full inquiries in the east, and Mr. Catt is going to devote his entire

time next week to getting prices on cast and wrought iron pipe and the cost of plant and equipment for doing the work, and other matters relative to the job.

"I want you to make very full and thorough investigation, too, AND THEN WE WILL COMPARE NOTES."

In Hoffman's letter to McMullen of January 23, 1893, (defendant's exhibit Z, record, p. 562), he says:

"Now, Mac, this is a pretty large contract and requires a good deal of capital, and I think we ought to put up some kind of a combination on it. I DO NOT CARE TO HAVE THIS CONTRACT ALL ALONE."

In Hoffman's letter to McMullen of January 30, 1893, (defendant's exhibit A 2, record, p. 563), he says:

"As you say we must do some rustling in the east if we want this work—now, my idea is, to get this iron punched and planed in the east, so that all we would have to do here would be to roll it when it came; that would save a lot of machinery, and I think it could be planed and punched cheaper in the east than here. I will enclose you a list of what it will take and the strength required; this will have to be iron (not steel), and I think if you could give this to Mr. Catt,

and if he has not got the time to look after it, he could give it to some iron broker, AND LET HIM GET US GOOD PRICES AND WE OUGHT TO GET THIS WORK, OR AT LEAST PART OF IT. I will go out over the line as soon as the weather settles a little.
 * * * "Anyway the time is short, and WE WILL HAVE TO RUSTLE HARD TO GET IN SHAPE TO MAKE A GOOD BID."

Hoffman writes to McMullen on February 3, 1893, (defendant's exhibit B 2, record, p. 565):

"I left an order with Col. Smith today to mail you 5 copies of specifications, as per your telegram. He expects to get them from the printers so that he can mail them to you this P. M. or tomorrow sure. You will see that the work is all split up, so I don't think it is as good for us if it had been all let in one bid.

"I will do what I can to get prices on the iron, AND WHEN YOU COME UP WE WILL MAKE UP OUR MIND WHAT TO BID ON. We ought to get part of this work any way.

"Let me hear from you when you expect to be here."

Hoffman writes to McMullen on February 8, 1893, (defendant's exhibit C 2, record, p. 565):

"I herewith send you strain diagrams on file for the bridges, profiles of the crossings, and details of the [*sic*] and profile of the bridges. The general

plans I cannot get now, but expect to have them tomorrow, and will then mail them to you. The engineer has changed his mind on the steel question and has concluded to ask for bids on steel also, but iron will be preferable all things being equal; and instead of having one pipe, 33 in. diameter for the submerged pipe, 2 26 in. pipes will be preferred. I will advise Mr. Catt about this."

Hoffman writes to McMullen on February 11, 1893, (defendant's exhibit D 2, record, p. 566):

"Have mailed you under separate cover today general plans for the three bridges. * * * Get the very best prices you can on cast iron. I will try and get prices from the O. I. & S. Co. on pipe. * * * WE ARE TO WORK ON THE MATTER AND WILL HAVE OUR FIGURES IN SHAPE BY THE TIME YOU GET HERE."

Hoffman writes to McMullen again on March 10, 1893, in regard to their operations which antedated the submission of their bid (defendant's exhibit E 2, record, p. 567):

"I think that we have the best part of the contract, and if we did not make a big mistake in our cost of laying, we will make a lot of money."

So on March 14, 1893, McMullen wrote Hoffman (defendant's exhibit G, record, p. 527):

"Now, Lee, that we have gotten rid of furnishing the plant, and rid of the organization and administration of a pipe shop, and got it reduced to a plain proposition of digging the ditch and laying and riveting the pipe, it will not require much money now to handle the job, perhaps you would like to buy me out, as the conditions that originally led us to go in together, namely, the large investment and administration involved, are now overcome, and you could handle this thing just as well without me as with me. You readily understand that it is a much simpler proposition now than it was when we first agreed to go together. Of course, I only make this as a suggestion. If you do not think favorably of it, and prefer to let it remain just as it is, we are agreeable, and will try and contribute our share to make the venture a success—which I feel sure it will be."

On March 16, 1893, Hoffman answers this letter (complainant's exhibit 21 1/2, record, p. 496), and says: "I don't care to buy you out now. I think our contract is good, and we will make much more than you ask, BUT AS IT IS A NEW LINE OF WORK I WANT YOUR ASSISTANCE."

In addition to this exchange of letters there is the oral testimony of the witnesses.

On his cross-examination by respondent's counsel, McMullen gives the following testimony:

"Q. Whatever consultations you had with Mr. Hoffman relative to procuring the contract from

the water committee was with a view of making you and he performing the work together in case you got the contract, was it not?

"A. Yes, sir.

* * * * *

"Q. You and he made figures together for the purpose of bidding on this contract that was afterwards awarded to Hoffman & Bates, did not you? (Record, p. 171.)

"A. We did.

"Q. And the contract was awarded upon the bid prepared by yourself and Mr. Hoffman?

"A. I think so; that is correct.

"Q. Do you not know so?

"A. Yes, I think I know so; if you will read the question again I will make it a little more explicit.

(Last two questions read to the witness by the examiner.)

"Yes, I know it is so. (Record, p. 172.)

* * * * *

"Q. Then while you and Mr. Hoffman were working together and preparing the bid, you had no expectation that if awarded to Hoffman & Bates you would be a partner to the execution of the work?

"A. Certainly I had expectations decidedly. All the correspondence for three months prior to

that will show that it was mutually agreed that we should be partners.

* * * * *

"Q. You misapprehended my question altogether; I made no such statement as that. Then I understand that while you and Mr. Hoffman were figuring together and preparing the bid for manufacturing and laying that pipe, you expected to be partners in executing the work if you got it, if it was awarded on that bid?

"A. Yes, that is correct, not only expected to be, but we had agreed to be." (Record, p. 173.)

On re-direct examination McMullen testified (record, p. 221):

"Q. Mr. McMullen, when did the matter of joint action between yourself and Mr. Hoffman in regard to the water works of the city of Portland under consideration first come up?

"A. It first came up several years before this job was awarded when the bids for building the Bull Run pipe line were taken, I think, in 1887, after we were the lowest bidder. At that letting Mr. Hoffman came to me and congratulated me, and said that we made a bold, good bid, and that he did not think we knew so much about pipe lines, and said that he was sorry that it was not going to go through; I think it was Governor Pennoyer that vetoed the bonds; he said, 'When this thing comes up again, Mac, WE MUST GO IN

TOGETHER, AND SEE IF WE CAN'T GET IT,' and we frequently talked during the time that intervened between that occasion and December, 1892, when again negotiations were actively commenced, and it was understood the water committee were going to let the contract early in the spring."

Henry S. Wood, a witness for McMullen, whose deposition was taken in San Francisco, testified (record, pp. 148-9):

"Interrogatory 9. State what the proposition was in connection with this bidding upon which you were engaged in San Francisco as to a bid, which was to be submitted by the San Francisco Bridge Company or McMullen in connection with Lee Hoffman; that is to say, the manner in which they were to bid upon the work?

"Answer. It was understood, as result of a visit of Lee Hoffman to San Francisco, before the letting, and as a result of conferences between him and John McMullen, at some of which conferences I was present, that said HOFFMAN AND McMULLEN WERE TO BID TOGETHER UPON THE WORK FOR MUTUAL ASSISTANCE, ADVICE AND PROFIT, and at no time was it considered probable that the San Francisco Bridge Company could or would bid alone upon said work with the intention of taking said work."

George W. Catt, a witness for McMullen, whose deposition was taken in New York, testified (record, pp. 151-3):

"Interrogatory 3. State whether or not you have any information in regard to the San Francisco Bridge Company, or John McMullen, its general manager, bidding on certain work let by the water committee of the city of Portland, Oregon, on the first day of March, 1893, for the purpose of bringing Bull Run water to the city of Portland.

"To the third interrogatory he saith: Soon after I had undertaken the management of the business of the San Francisco Bridge Company for the states of Oregon, Washington, Idaho and Montana, Lee Hoffman, of Portland, Oregon, then proprietor and manager of the business conducted under the firm name of Hoffman and Bates, approached me in reference to the San Francisco Bridge Company and that firm joining forces for the building of the contemplated 'Bull Run' water works for the City of Portland, Oregon. Lee Hoffman and I had several conferences concerning such a union of the two concerns for this work. In 1891, Mr. Lee Hoffman and I journeyed together from Spokane, Washington, to Tacoma, Washington, via the N. P. R. R. During this journey Lee Hoffman and I arrived at a basis of agreement by which the S. F. B. Co. should unite with Hoffman & Bates in the construction of the 'Bull Run' water works, in case either of us secured from the city of Portland, Oregon, the contract for building said works. The essential point of that agreement was, that

the work should be executed by us jointly for the joint account of the two companies, and the two companies should share alike in all losses or profits that might result from such contract for building the 'Bull Run' water works. It was a general understanding between us, the details of the agreement being left to be settled when a contract was obtained. This arrangement was often referred to by Lee Hoffman, between time of making of it and time of my departure for the management of the San Francisco Bridge Company's business on the Atlantic Coast. It was also agreed between Lee Hoffman and myself that I should make such investigation as I could in reference to the requisite plant, proper tools, etc., for the manufacture of steel water pipe. As a result of this I did make such investigation as I could in reference to the requisite plant, proper tools, etc., for the manufacture of steel water pipe. As a result of this I did make some investigation during the year 1891, by correspondence with manufacturers of tools, etc., also visited the Albion Iron Works of Victoria, B. C., which was at that time manufacturing some pipe of this character. I advised the San Francisco Bridge Company at San Francisco, through Mr. McMullen, of this arrangement with Lee Hoffman, and when the work was advertised for the city of Portland, Oregon, in 1893. In making my estimate for the work mentioned I addressed some of them to J. McMullen and Hoffman & Bates

jointly. The agreement was that J. McMullen should collect what information he could at San Francisco, California, with the assistance of the engineering force of the San Francisco Bridge Company there concerning the proposed work. He was to take such information with him to Portland, Oregon, where he would meet with Lee Hoffman, who would have secured such information as he could on the same subject modified by his more accurate information of the local conditions, and that what information I could secure by investigation in the east would be forwarded to Lee Hoffman and J. McMullen, of Portland, Or., and that after they had made a comparison of all information collected, they should agree upon the amount to be bid for the work jointly."

H. D. Bush, a witness for respondent, testified as follows:

"Q. Mr. Bush, you may state your name, age, residence, and occupation.

"A. My name is Harry Dean Bush, 38 years old; my present residence is Springfield, Massachusetts; I am a civil engineer.

"Q. Were you ever at any time in the employ of Lee Hoffman?

"A. Yes, sir.

"Q. When did you first enter his employment, and how long did you remain in it?

"A. I entered his employ in September, 1892, and remained until December, 1895. (Record, p. 262.)

"Q. What, if anything, had you to do while you were in the employ of Mr. Hoffman in making estimates or bids for bringing Bull Run water to Portland?

"A. Mr. Hoffman went to San Francisco some two weeks before the time of opening bids; he instructed me before he went away to make an estimate of the cost of manufacturing and laying pipe so as to be able to prepare a bid on his return. (Record, p. 263.)

* * * * *

"Q. What occurred on his return, if anything, in relation to preparing bids on this work for the manufacturing and laying of the pipe, plates, etc.?

"A. Well, Mr. McMullen came up with him, AND MR. HOFFMAN INFORMED ME THAT HE AND MR. McMULLEN WERE GOING TO BID TOGETHER FOR THE WORK; Mr. McMullen had a great many estimates and figures and letters referring to the cost of the work, and I went all through those. (Record, p. 264.)

* * * * *

"Q. And what was the final total of the bid that you made out, or which was made out for you by Mr. Hoffman?

"A. The final total of that bid that we expected to put in, until within the last hour, was \$479,167.00.

"Q. \$479,167.00?

"A. Yes, sir.

"Q. What was the bid that you actually put in

"A. \$465,667.00.

"Q. How did that come to be reduced?

"A. Why, Mr. McMullen came into the office within the last hour, very much excited, and said that he had made up his mind that we were too high, and had got to take off something; we took off five cents a yard on the item of earth excavation; this amount is 270,000 yards at five cents a yard, amounting to \$13,500.00." (Record, p. 266.)

* * * * *

On cross-examination this witness testified:

"Q. I understand that the aggregate estimate at which you arrived upon which a bid might be predicated for all the work in connection with the manufacturing and laying of the steel conduit from the head works of this system to Mt. Tabor was \$420,257.00?

"A. Yes, sir.

"Q. Now, that was raised afterwards to \$479,167.00?

"A. Yes, sir.

"Q. Who made that raise?

"A. Hoffman told me to raise it. Hoffman and McMullen talked the thing over that there ought to be more profit in it.

"Q. Hoffman and McMullen together?

"A. Yes, sir. (Record, p. 282.)

* * * * *

"Q. And when Hoffman came back from San Francisco just before the letting of this work, McMullen came with him, you say?

"A. I think so, yes, sir.

"Q. After Hoffman said that McMullen was going to bid with him on the work?

"A. YES, SIR; THEY WERE GOING TO BID TOGETHER." (Record, p. 283.)

On re-direct examination Bush testified:

"Q. After Mr. McMullen came here from San Francisco, and between the time of his arrival here and the time the bid which was agreed upon between him and Mr. Hoffman was submitted to the water committee, were you in receipt of any information requiring a change of any sort in the estimates upon which that bid was based?

"A. No, sir; they were not in receipt of anything that required any change. Mr. McMullen

brought his telegrams in to me, but I did not see anything that made any particular change necessary. (Record, p. 300.)"

Robert Wakefield, a witness for McMullen, testified (record, p. 423):

"Q. Did you ever have any talk with Mr. Hoffman during his lifetime in regard to the procurement of the contract which was secured by him with the city of Portland for the manufacturing and laying of steel pipe in connection with McMullen's association with him?

"A. Yes, sir.

"Q. I will ask you to state whether or not in the course of any of your conversations Mr. Hoffman said anything to you about how the contract had been secured.

"A. Yes, sir.

"Q. You may state what he did say.

"A. He said that he would not have been in it only for McMullen, that is the words he used, 'He would not have been in it only for McMullen.'

"Q. Was anything said in regard to figures which had been made on the contract—estimates by one or the other of them?

"A. Yes, sir.

"Q. What did he say about that?

"A. He said that McMullen made him come down between \$40,000 and \$50,000."

We feel justified in making this prolix review of the evidence from the fact that the circuit court of appeals decided the cause upon the theory in large measure contended for by respondent's counsel that the action of Hoffman and McMullen tended to stifle competition; that except for their agreement McMullen would have put in a lower bid than the one cast by him; and that by this combination between them the city of Portland lost the advantage of having McMullen as an actual competitor for the work. It is largely upon this misconception of the case before them that the circuit court of appeals were led to render their decision.

We do not claim to hold the counsel for respondent precluded from their argument that Hoffman and McMullen knew the bids which were cast by each of them for this work, and that Hoffman knew that McMullen proposed to submit what would appear to be an additional bid to that submitted by Hoffman in their joint interest; *but we do assert that there is not the slightest warrant for holding or claiming that Hoffman and McMullen ever intended to compete with each other upon this letting, or that an actual bidder was lost to the city of Portland by the course which they pursued.*

The primary question before the Court is, therefore, this :

Where Hoffman in the joint interest of himself and McMullen submitted a bid to the city of Portland, while McMullen, with Hoffman's concurrence, submitted a fictitious bid in larger amount for the same work, and a contract was awarded to Hoffman on his bid; and where Hoffman and McMullen, as partners, performed the work covered by this contract and made a profit which is in Hoffman's hands, can he refuse to divide with McMullen on the ground that he and McMullen were guilty of a fraud in their bidding, this fraud consisting in McMullen having submitted his larger bid?

We state the case at this time in its broadest aspect for the purpose of drawing full fire from respondent's counsel. If the question is answered in the negative, that is an end of this branch of the discussion.

It is no more than fair to counsel for respondent to state here that their contention has heretofore been, and presumably still is, that it was an inherent part of the partnership contract between Hoffman and McMullen that they should endeavor to secure a contract from the city by the means which are assailed; while we insist that it was no part of *their partnership contract*, but, granting for the argument, respondent's contention in regard to the character of their acts in submitting bids, it was no more than the performance of an illegal act in the advancement of

a legal contract of co-partnership. But the distinction is really an immaterial one, as the result must be the same in either case.

With regard to the partnership agreement between Hoffman and McMullen it will be noted that the only promises made by either of them are:

1. That Hoffman and McMullen shall share equally in the contract awarded by the city of Portland to Hoffman & Bates, for manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for said city ;

2. That each will furnish and pay one-half of the expenses of performing said contract ;

3. That each shall receive one-half of the profits, or bear and pay one-half of the loss, arising from such performance ; and

4. That if either of the parties gets a contract for doing, or do, any other part of the work let, or to be let, for bringing Bull Run water to Portland, the profits or losses arising from the performance of such contract shall be shared and borne by the parties equally.

Thus, neither Hoffman nor McMullen was required by said partnership agreement to do anything at all open to objection by the most scrupulous person, since the agreement called for nothing but the performance of just such duties as

are generally assumed, when parties enter into an agreement of that character.

Nor can there be any question as to the validity or legality of the consideration for that agreement, which was the mutual promises of Hoffman and McMullen to assume the relation of co-partners on the terms specified in the agreement and for the purposes mentioned therein, which were the fulfilment of the contract entered into with the city of Portland for the manufacture and laying of said pipe line, and the performance of any other contract with said city in connection with the construction of its water works that might be thereafter obtained by either Hoffman or McMullen.

We shall answer further along the contention of respondent's counsel that back of this formal instrument there was a fraudulent compact between Hoffman and McMullen which led up to and became merged in this writing. For the time being we content ourselves with saying that the work contemplated by this contract was performed, that respondent has in her possession its fruits, and that McMullen is seeking in this suit to recover his half interest therein as a partner.

Some preliminary consideration of the rights and obligations existing between partners and between principal and agent may prove of utility in approaching a discussion of the legal questions involved in the pending case.

The contract of March 6, 1893, together with the action of the parties under it established, the relationship of partners between Hoffman and McMullen ; and out of this relationship, and not out of the partnership agreement, grew the rights which McMullen is seeking to enforce in this suit.

Partnership is a condition. Its results are determined by the application of legal principles. It may have its origin in an express contract, and the contract may be useful in furnishing a guide for the measurement of the rights and duties of the partners *inter se*. In case of a controversy, its settlement must be determined in the light of the contract stipulations. But the contract is only a matter of evidence in determining the adjustment of conflicting claims growing out of transactions had under it. As to such matters, it is not a cause of suit, nor is the cause of suit predicated upon it. After an agreement to form a partnership has been entered into, if either partner refuses to proceed,—to launch the partnership,—the other may have his action for damages for breach of contract, or, it may be, a suit for specific performance. In such a case the cause of action rests upon and grows out of the contract to be partners. But after the partnership has once been launched, if a controversy arises between the partners, the cause of action grows out of and rests upon the partnership *relation*; and if a claim to property is involved, it is the property right of the partner, growing out of

partnership relation, although the extent of the right may be defined by the contract, which gives him his standing in court.

In 1 Lindley on Partnership, 2d Am. ed., p. 2, it is said :

"Partnership, although often called a contract, is in truth the *result* of a contract; the *relation* which subsists between persons who have agreed to share the profits of some business rather than the agreement to share such profits."

In Mechem's Elements of Partnership, p. 3, speaking of the definition of "partnership" sometimes given in works on that subject, it is said :

"In several of the definitions, partnership is spoken of as a contract. It is, however, rather the *result* of a contract than the contract itself; it is the *relation* or association which the contract creates."

And in Bates on Partnership, vol. 1, sec. 78, it is said :

"An executory contract to form a partnership is not a partnership, though it may ripen into one, by being what is called launched, that is, by carrying the agreement into effect and engaging in the joint undertaking; but the effect and the agreement itself are two different things."

So also, in Pollock's Digest of the Law of Partnership, sec. 1, it is said :

"Partnership is the *relation* which subsists between persons who have agreed to share the profits of a business carried on by all or any of them, on behalf of all of them."

In Parsons on Partnership, 4th ed., sec. 6, note *d*, speaking of an executory contract to form a partnership, it is said :

"The contract is executed when the partnership relation is entered into. All that is done after that, is done by and for the partnership. If land is purchased, it is the land of the partnership, and not of the individual partners. *In short, the only action that could be brought for breach of the contract would be an action for failure to launch the partnership. Any cause of action arising after the partnership was formed would arise out of the partnership relation.*" (Italics ours.)

Another principle applicable to the point under consideration is that the relation of partnership is one of agency. What one partner does, is done as agent for the other ; what one receives, is received as agent for the other and in trust for the other to the extent of his interest ; and the agent or trustee cannot shield himself from accountability by claiming that the thing which had come to him was tainted.

In Story on Partnership, sec. 1, it is said :

"Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules as those of an agent. A partner, indeed, virtually embraces the character both of principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may as properly be deemed an agent. The principal distinction between him and a mere agent is, that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership."

Speaking of this statement of the law relating to partners, Lord Wensleydale, in *Cox vs. Hickman*, 8 H. of Lords Cas., 268, 311, said :

"The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view. Mr. Justice Story lays it down in the first section of his work on Partnership."

That the same rule applies between partners as between principal and agent is clearly shown by the decision in *Planters' Bank vs. Union Bank*, 16 Wall., 484, which was a clear case of agency,

and in which *Brooks vs. Martin*, 2 Wall., 70, a case of partnership, was followed as having settled the law applicable to the case.

The controlling importance of these principles upon the cause in suit, if not obvious, will be shown a little further along.

No partnership touching the work in controversy resulted from anything which transpired between Hoffman and McMullen prior to the award made upon Hoffman's bid, nor until they had signed the partnership agreement of March 6, and entered upon the performance of the work contemplated therein.

It has been the contention of counsel for respondent that the entire arrangement between Hoffman and McMullen to secure a contract from the City of Portland and to execute it, if secured, by their joint action, was, for all the purposes of this suit, void from its commencement to its conclusion by reason of what they claim to be the fraudulent practices indulged in by Hoffman and McMullen in the submission of their bids. On the other hand, we assert that there were two distinct partnership engagements—one to co-operate in the effort to secure a contract from the city, coupled with the mutual promise to become partners in the execution of the work, if secured, and the other the agreement of March 6. The one came into existence with their first contemplation of joint action in their bidding and terminated

with the award which was made on Hoffman's bid; the other began with the contract of March 6, and will not be terminated until the final decree of this court is rendered settling and adjusting the respective rights and interests of the partners in the accomplished venture. Or, at least, the break indicated establishes two distinct stages in the joint negotiations and operations of Hoffman and McMullen, and it cannot be said that they were partners in the subject of this suit by virtue of anything which occurred between them prior to the award made by the City of Portland on Hoffman's bid. It seems to us that our first characterization of the situation is the accurate one. The first agreement between the parties was absolute, the second depended on a contingency; upon the first they went immediately to work, the second might have wholly failed.

McMullen testifies on this point on cross-examination:

"Q. When did it first occur to you to make contract, exhibit No. 1?

"A. After the water committee had awarded the contract to Hoffman & Bates on their bid; I think that award took place on the 4th or 5th of March; exhibit No. 1 was made on the following day, or the 6th of March.

"Q. Then while you and Mr. Hoffman were working together and preparing the bid, you had

no expectation that if awarded to Hoffman & Bates you would be a partner to the execution of the work?

"A. Certainly I had expectations decidedly. All the correspondence for three months prior to that will show that it was mutually agreed that we should be partners.

"Q. What, then, did you mean by your last answer, in which you said you did not expect contract, exhibit No. 1, would be executed at the time you put in the bid for the work?

"A. Well, your question seems to assume that exhibit No. 1 was in existence before the bid for the work was put in.

"Q. You misapprehended my question altogether; I made no such statement as that. Then I understand that while you and Mr. Hoffman were figuring together and preparing the bid for manufacturing and laying that pipe you expected to be partners in executing the work if you got it, if it was awarded on that bid?

"A. Yes, that is correct, not only expected to be, but we had agreed to be.

"Q. Then the contract, exhibit No. 1, was simply reducing into the form of a writing the agreement that had already been made between you long previous?

"A. That is not quite correct; the agreement was that we should bid together—that we should

make a bid on this job together; now, there was an 'if' there, in other words, the conditions that prevailed after the contract was awarded was different from the conditions that prevailed when we were simply in the air trying to see what the job would cost, and conferring with each other; but we had a tangible, absolute thing when the award was made from the water committee of the City of Portland for a half million dollars' contract, and that award was of record, and exhibit No. 1 was a declaration that we were partners in the existing contract between Mr. Hoffman and the Portland water committee. (Record, p. 173.)

* * * * *

"Q. The general purport of that contract had not that been entered into between you long before that?

"A. You understand as a lawyer that we could not make the contract—

"Q. Just answer the question I have asked you.

"A. No, you could not say that because this contract, exhibit No. 1, says that so and so existed, and so and so did not exist before that award; we had agreed to be partners, if that is all the agreement meant after reducing it to writing, if the same thing was synonymous in your mind; I think the two things are entirely different. (Record p, 174.)

* * * * *

"Q. Well, Mr. McMullen, I am coming to the point ; now, then, as I understand you, your statement is about this : You and Mr. Hoffman had an understanding together that you would bid for the work that has been named in your deposition, that in pursuance of that agreement you did prepare a bid for that work, and submit it to the water committee, and the contract was awarded by that committee to Hoffman & Bates, in whose name the bid was put in ; that you and Mr. Hoffman afterwards made the contract, exhibit No. 1, in this case, for the purpose of performing that work, is that it?

"A. That is correct." (Record, p. 175.)

The terms of the contract of March 6 subscribed to by both Hoffman and McMullen support this interpretation of the attitude they sustained towards each other.

In confirmation of the distinction between an agreement entered into by two persons to become partners and their actual situation as partners, we submit the following additional authorities :

In *Groves vs. Tallman*, 8 Nev., 178, 180, the court said :

"As between partners, the ultimate facts whence a partnership is deduced are—first, the agreement ; second, its execution ; summed up as the executed agreement."

In *Powell vs. Maguire*, 43 Cal., 11, the court said (p. 19):

"In such cases it is well settled that, when the partnership was never launched, and when one of the co-partners has proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other party therefrom, and repudiating the partnership agreement, the only remedy of the injured party is an action at law for a breach of contract. There would be in such a case, no existing partnership, but only an agreement to form one, which was never consummated by launching the enterprise."

In *Reboul vs. Chalker*, 27 Conn., 114, 130, the court said:

"If we are right in this, that the partnership did not in fact commence until the first of May, it is quite clear that until that time it was in the power of either party to refuse to go on with it. It was like any other executory contract, which either party may refuse to carry out; and the remedy for such refusal would be an action for such damages as the party may have suffered in consequence of it."

So, also, in *Wilson vs. Campbell*, 5 Gilm., 383, 402, the supreme court of Illinois said:

"A mere agreement to form a partnership does not of itself create a partnership. The parties must enter on the execution of the agreement before the relation of partners exists between them. While the agreement remains executory, if one of them refuses to carry it into effect, the only remedy of the other is by an action at law for the violation of the agreement, or by a bill in equity to enforce specifically its performance."

Again, in *Lycoming Ins. Co. vs. Barringer*, 73 Ill., 230, 233, the same court said:

"A partnership was contemplated, but never consummated. An intention to form a partnership, or an agreement to form one, does not create a partnership. *Wilson vs. Campbell*, 5 Gilm., 383."

And in *Doyle vs. Bailey*, 75 Ill., 418, 421, the court said:

"There is a wide difference between a partnership entered into between two parties in regard to certain business, and an agreement to form a partnership. In the case of *Wilson vs. Campbell*, 5 Gilm., 383, it was held that a mere agreement to form a partnership does not of itself create a partnership. The parties must enter upon the execution of the agreement before the relation of partners exists between them."

So, also, in *Meagher vs. Reed*, 14 Colo., 335, 347, the court said :

"A marked distinction exists in law between an agreement to enter into the copartnership relation at a future day and a copartnership actually consummated. It is an elementary principle that a partnership in fact cannot be predicated upon an agreement to enter into a copartnership at a future day unless it be shown that such agreement was actually consummated. In the language of the text-books, the partnership must be 'launched.' To constitute the relation, therefore, the agreement between the parties must be an executed agreement. So long as it remains executory the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement."

The court then proceeded to state the distinction between an agreement *of* partnership and an agreement *to become* partners at a future time, and said :

"It is undoubtedly true that a partnership *in presenti* may be constituted by an agreement if it appears that such was the intention of the parties. But where it expressly appears that the arrangement is contingent, or is to take effect at a future day, it is well settled that the relation of partners does not exist, and that, if one or more of them refuse to perform the agreement, there is

no remedy between the parties except a suit in equity for specific performance or an action at law for the recovery of damages, should any be sustained."

It is plain, therefore, that the agreement of Hoffman and McMullen to become partners, in case a contract should be awarded by the City of Portland on a joint bid put in by them, did not establish any partnership relation between them, and that when the event mentioned occurred, no partnership existed between Hoffman and McMullen, until said agreement *to become* partners had been fulfilled by their actually assuming that *relation* towards each other.

McMullen's cause of suit was not based upon the partnership contract, but upon the duty of Hoffman to account to him for half their earned profits, which duty grew out of and rested upon their relationship as partners.

To the minds of counsel for McMullen this point is so absolutely clear as to be beyond the pale of debate, and had the circuit court of appeals recognized it their conclusion must have been the reverse of that announced.

It is conceded both by counsel for respondent and by the circuit court of appeals, while denying McMullen's right to relief under the facts in evidence, that if Hoffman, after he had received the money from the City of Portland, had acknowledged McMullen's interest in the fund, or promised to pay it to him, then McMullen might

have successfully maintained an action based on such acknowledgment or promise. In their opinion the circuit court of appeals say (record, p. 614):

"If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. (*Hanks vs. Baber*, 53 Ill., 292; *Chace vs. Trafford*, 116 Mass., 532; 1 Am. & Eng. Enc. Law (2d Ed.), 437). But it does not appear that any such admission has been made. No promise has been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought."

This concession carries with it an unqualified admission of McMullen's right to recover in this suit, for the simple reason that an implied promise is as effectual in law as an express one, and the very receipt of the money by Hoffman raised an implied obligation on his part to pay over to McMullen his half of it.

Where money is received by one to the use of another it does not require an express admission or promise from the depository to enable the beneficiary to recover. Such admission or promise is simply a matter of evidence going to establish the right in court, and is not to be confounded with, or mistaken for, the right itself. And so it is in all questions of accounting be-

tween partners and between principal and agent. The contract of partnership or of agency is but *evidence of the relationship* from which there may be inferred the implied promise to account, but it is not the cause of suit, it is not a promise to pay, and no specific promise is necessary to sustain a recovery. All of these cases stand upon the same footing.

Under the modern rules of pleading from which the fictions of the common law have been discarded, allegations of express promises to perform duties laid upon the promisor by virtue of his relationship towards the promisee are dispensed with, the principles of law applicable to the relationship supplying the promise, and thus affording the cause of suit. Mr. Pomeroy in his work on Remedies and Remedial Rights says, Sec. 540:

"The practical rule may be considered as settled, that, in all instances where the right of action is based upon a duty or obligation of the adverse party which the common law denominates an implied contract, it is no longer *necessary* to aver a promise, but it is enough to set out the ultimate facts from which the promise would have been inferred. This being so, we must go a step farther. If it is not *necessary* to make such an allegation, then it is not *proper* to do so."

The keynote of the principle upon which McMullen must prevail in this suit was struck in

Tenant vs. Elliott, quoted with approval by this court in *McBlair vs. Gibbes*, 17 How., 232. It is said by Mr. Justice Nelson on page 236 :

"In *Tenant vs. Elliott*, 1 Bos. & P., 3, the defendant, a broker, effected an insurance for the plaintiff which was illegal, being in violation of the navigation laws ; but on a loss happening, the underwriters paid the money to the broker, who refused to pay it over to the insured, setting up the illegality, upon which an action for money had and received was brought. *The plaintiff recovered, on the ground that the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction.* The same principle was applied and enforced in the case of *Farmer vs. Russell*, 1 Bos. & P., 296." (Italics ours).

In *Tenant vs. Elliott*, Eyre, C. J., stated the proposition under consideration thus :

"The question is, whether he who has received money to another's use, on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him ? I think he cannot."

In *Farmer vs. Russell*, 1 Bos. & P., 296, the defendants, who were common carriers, agreed with the plaintiff to take certain goods called medals to Portsmouth, and to deliver them to a

person there on receiving payment for them. It appeared that the medals were, in fact, counterfeit halfpence, sent to Portsmouth for the purpose of being distributed there among the sailors. The defendants received the money for the medals, and accounted for all of it except £13, for the recovery of which the plaintiff brought the action. Chief Justice Eyre stated the question thus :

"The plaintiff's demand arises simply out of the circumstances of money being put into the defendant's hands to be delivered to him. This creates an *indebitatus*, from which an *assumpsit* arises."

Buller, J., said :

"The plaintiff's case was made out, when he showed that the defendants had received so much money for his use, and it was immaterial whether this money was paid on a legal or an illegal contract. The money having been paid 'by another' to the plaintiff's use, the illegal contract is out of the question."

Can it make the slightest difference that in one case the action may be at law for a known or admitted sum of money, while in a suit like the pending one an ascertainment of the amount due must be sought in the proceeding for its recovery? The basic principle governing the *right of recovery* is the same in each instance, and this

right is not to stand or fall by the *form of action* to which the plaintiff is compelled to resort for its enforcement.

Can it be possible that McMullen's right to recover his interest in this fund depends upon Hoffman's admission or promise to pay? The court of appeals decided this cause on the theory that because of the corruption between Hoffman and McMullen, and because of the interest of the public in putting the seal of condemnation upon their practices, McMullen could not recover. Now if that is a fatal objection to McMullen's suit in the absence of Hoffman's explicit admission or promise to pay, does the power lie with Hoffman, by a simple admission or promise, to strike down this public interest, or can he make the transaction "honest by a single stroke of the pen?"

It is clearly apparent that the learned circuit court of appeals fell into an error in their conception as to what constituted McMullen's cause of suit, and having done this it is easy to see how they reached an erroneous result.

McMullen does not need the support of the matters urged by the respondent in defense of his suit, and the court have no occasion to investigate these matters in arriving at a solution of the pending controversy.

What has just been said has application to this point and perhaps suggests sufficient for its answer, but so much stress was laid by the cir-

cuit court of appeals upon the idea that the exigencies of McMullen's case required them to investigate questions of alleged fraud, that we feel justified in presenting more fully our views upon the proposition. In the opinion rendered by Judge Hawley he says (record, p. 614):

"This suit is brought for an accounting between the parties of the profits realized on the contract made with the committee for the city of Portland upon its award to Hoffman & Bates upon the bid of Hoffman. The foundation of the case rests upon the legality of that contract. *

* * * * * The relief prayed for required the court to investigate all of the various transactions of the parties from the beginning to the end, and adjust the differences between them. We are called upon to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils, and to help them make a just and equitable division. This is just what the courts in all cases of illegal contracts, agreements, or enterprises have universally refused to do."

With all deference to the learned judge, we protest:

1. That the foundation of the case does not rest upon the legality of the contract between Hoffman and the city of Portland.

2. That the relief prayed for did not require the court to investigate all the various transactions of the parties from the beginning to the end.

3. That if the court were called upon to examine obnoxious matters, the call emanated from Hoffman and not from McMullen, and it ought not to have been entertained.

The first proposition has been sufficiently proven.

With regard to the second, it is true that in the bill of complaint allusion is made to the bidding as introductory of the contract between Hoffman and McMullen, but the allegations were purely by way of inducement. The bill would have been every whit as good without these allegations as with them, and McMullen would have omitted them had he foreseen in any degree the course subsequently adopted by Hoffman. When it came to the taking of the testimony, McMullen opened his case by introducing the partnership agreement of March 6, 1893, and objected to all of respondent's evidence which has relation to matters antedating the agreement. (Record, p. 172).

McMullen made his case by showing:

1. That he and Hoffman were partners in the work done for the city of Portland, and, *as evi-*

dence of this fact, he introduced their agreement of March 6.

2. That as partners he and Hoffman had made a certain profit on the work, and, as evidence of this fact, he introduced Hoffman's books of account.

McMullen did not call upon the court to examine any of the matters which the circuit court of appeals find to have been pernicious, nor did his right to recover depend upon them in any degree. He had made his case without reference to them. All the matters constituting the basis of relief sought by him were to be found in the books of account kept by Hoffman, and ascertaining from the partnership agreement of March 6 that McMullen was entitled to half the earned profits, the rest was simply a proposition of mathematical calculation. Indeed, there was no real occasion for his offering the partnership agreement at all, for its terms and the fact that the parties had entered into it, as alleged in the bill, were admitted in the answer, so that the court need have looked to the books of account alone. And so far as the circuit court of appeals were concerned, the results shown by the books appear in the record by an agreed statement of facts. There was not and could not have been anything legitimately in the record repulsive to the court.

The decree of the circuit court commences with a finding that on the 6th day of March this

agreement was entered into, and then proceeds to dispose of the controversy with this date as the initial point. (Record, p. 92). We submit that McMullen was right in the course he pursued, and that the decree is well framed.

Judge Hawley says again in his opinion (record, p. 599) :

"No court will lend its aid to a man who founds his cause of action upon immoral or illegal acts. If, from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa* or a transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was bringing his action against the plaintiff, the latter would have the advantage of it; for, where both are equally at fault, *potior est conditio defendentis*."

We grant the truth of the general statement first made, and while we deny that our cause of action possesses any vice, we will briefly submit our conception of the maxim adverted to and show the misapplication made of it to the pending case.

In cases of *par delictum* we understand the rule to be that the moving party cannot secure

any affirmative relief against the other if he rests his demand upon a rotten foundation,—if he must make out his case through the medium and by the aid of something which the law will not tolerate,—and that if the plaintiff does not disclose the fact that his demand is thus infected, the defendant may show that the plaintiff is dependent upon, or “requires the aid of,” *the illegal thing* as a condition of success. But this is a purely defensive weapon. Neither party can gain any advantage from his situation except by uncovering, when attacked by the other, the inherent weakness of his adversary’s case. Neither can make a merit of their common state nor get any benefit from it except in this indirect way, and the salient vice of the decision of the court of appeals is that it was in nowise shown by either McMullen or the respondent that McMullen’s case was dependent upon, or that he required the aid of, the matters which the respondent claims were fraudulent, for the enforcement of his demand; and yet the respondent was allowed to invoke the aid of the common fraud (so found), and thus, independently of the necessities of McMullen’s case, to defeat his recovery.

It was the respondent who brought into the case the matters which the court of appeals found to be fatal to the petitioner’s right of recovery, and her action was entirely unnecessary for the proper disposition of the controversy.

A number of decisions of the New England courts based on the "Sunday laws" of those states afford useful analogies. Thus in *Welch vs. Wesson*, 6 Gray, 505, the parties had engaged in a driving contest for a wager, and in its progress defendant wilfully ran down plaintiff and broke his sleigh. To plaintiff's action for damages defendant was allowed to prove that the parties were violating the law when the injury occurred. On appeal the court said (p. 506):

"That he [plaintiff] had no occasion to show into what stipulation the parties had entered, or what were the rules or regulations by which they were to be governed in the race, or whether they were in fact engaged in any such business at all, is apparent from the course of the proceedings at the trial. The plaintiff introduced evidence tending to prove the wrongful acts complained of in the writ, and the damage done to his property, and there rested his case. If nothing more had been shown, he would clearly have been entitled to recover. He had not attempted to derive assistance either from an illegal contract or an illegal transaction. It was the defendant, and not the plaintiff, who had occasion to invoke assistance from proof of the illegal agreement and conduct in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit. The plaintiff sought nothing of this kind, and the mutual misconduct of the parties in one particu-

lar cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another."

In *Hall vs. Corcoran*, 107 Mass., 251, the defendant hired from the plaintiff, on a Sunday, a horse and sleigh to drive from South Adams to North Adams for pleasure. After reaching North Adams the defendant drove to Clarksburg, and on their return from that place the horse and sleigh were injured.

At the trial of the action in the superior court it appeared, upon cross-examination of the plaintiff and of a witness called on his behalf, that the hiring was on a Sunday, and the judge ruled that the action could not be maintained.

The supreme court said (p. 257):

"Proof of the contract under which the horse was delivered by the plaintiff to the defendants showed indeed that the driving of the horse beyond North Adams was not within its terms or object; but the only legitimate inference from that fact is, that it is wholly immaterial whether such a contract was ever made, or, if once made, whether it had been terminated by mutual assent of the parties or by the wrongful act of the defendants. In short, the defendants' liability for the injury done by them to the plaintiff's property is not affected by the question whether the contract between the parties was valid or void in

law, or whether there was or was not any such contract in fact. That contract need not therefore be shown by the plaintiff; and if proved by the defendants, by cross-examination of the plaintiff's witnesses or otherwise, it has nothing to do with the plaintiff's cause of action against the defendants."

So in *Woodman vs. Hubbard*, 5 Fost., 67, the plaintiff's horse was hired by the defendant on a Sunday to go from Great Falls to South Berwick. Defendant drove the horse to South Berwick, and from thence to another place some miles beyond. Soon after the horse was returned by the defendant to the plaintiff it sickened and died, and the evidence on the part of the plaintiff tended to show that the death of the horse was occasioned by the unreasonable and immoderate driving of the defendant.

It was contended on the part of the defendant, that, as the horse was let under a contract made on a Sunday and for use on that day, the plaintiff could not recover any damages from the defendant for the conversion of the horse.

A verdict was rendered for the plaintiff, and on a motion of the defendant to set it aside and to grant a new trial, the supreme court of New Hampshire said (p. 74):

"In this case, the defense set up is that the plaintiff's contract was not merely invalid, as in

the case of infancy, but illegal; and that in showing the conversion of the horse, by driving beyond the place for which he was hired, the plaintiff was obliged to prove his own illegal act. It has been sometimes laid down in general terms that the plaintiff cannot recover, if, in order to make out his case, he is obliged to show his own illegal act. This is undoubtedly the rule when the plaintiff's illegal act is in whole or in part *the foundation of his claim*. In the cases usually cited as authorities for this rule, the plaintiff's claim was made through or under the illegal act. *Simpson vs. Bloss*, 7 Taunton, 246, (2 C. L., 89;) *Fivaz vs. Nichols*, 2 M. G. & S., 500, (52 C. L., 500.) But, where the wrong is done to the plaintiff's property, and the facts are connected with an illegal contract respecting the property, which does not affect the plaintiff's right of property, these cases do not show that he cannot recover, because he is incidentally obliged to prove a contract which leaves his *right of property* untouched, and does not in its consequences reach to the case on which he relies." (Italics ours.)

McMullen's suit against Hoffman was founded on *property rights* entirely, viz., upon McMullen's equitable ownership of a half interest in the contract made by the city of Portland with Hoffman and on McMullen's ownership of one-half the profits realized from the partnership business carried on by Hoffman and him; while the illegality and fraud set up by Hoffman was in

a transaction which did not affect in any manner the property rights mentioned.

It is plain, therefore, that Hoffman's defense of illegality and fraud, did not reach to the case relied on by McMullen for a recovery in his suit against him.

The test as to whether the connection between a matter in suit and an illegal transaction will defeat or affect a recovery in the suit is simple and clearly understood. It has been declared in terms by this court.

In *Armstrong vs. American Exchange Bank*, 133 U. S., 433, the court say (p. 469):

"An obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid of the illegal transaction to make out his case."

And in *Swan vs. Scott*, 11 S. & R., 155, 164, the rule is stated thus:

"The test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is, whether the plaintiff requires the aid of the illegal transaction to establish his case."

In *Wright vs. Pipe Line Co.*, 101 Penn. St., 204, Paxson, J., quotes this passage with approval,

and adds (p. 207): "The converse of this proposition is equally true: that where the plaintiff has made out his case without calling the illegal transaction to his aid, the defendant who has enjoyed its benefits cannot set up the defense of *ultra vires*."

Here McMullen made complete proof without reference to the alleged illegal transactions. He sought no aid from them and required none. So far as his partnership agreement is concerned, it was supported by his promise to perform services for the firm. So far as his right to share the profits earned by the firm went, his demand was supported by the services he had performed.

In *Frost vs. Plumb*, 40 Conn., 111, the defendant hired a horse of the plaintiff, to drive from Waterbury to Southington, on Sunday. The horse was driven by the defendant ten miles beyond Southington, and it was claimed by the plaintiff that the extra distance the horse was driven, coupled with immoderate driving, caused its death. The action was brought to recover the value of the horse; and the trial court instructed the jury, that the defendant was not liable, although the injury occurred in going to a different place, and beyond the limits specified in the contract. The supreme court held the instruction was erroneous, and, after a review of the authorities bearing on the question, said:

"Thus it will be seen that the law of Massachusetts on this subject is now in substantial harmony with the law of Maine and New Hampshire. We think that the law of this state ought to be, and is, the same. * * * We understand the rule to be this :—the plaintiff cannot recover whenever it is necessary for him to prove, *as a part of his cause of action*, his own illegal contract, or other illegal transaction ; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal. If it is, whatever may be the form of the action, he cannot recover. Apply that rule to this case. It was only necessary for the plaintiff to prove his own title to the property, and a conversion by the defendant. The destruction of the horse was a conversion ; and proof that the injury which caused his death occurred while being driven without the consent of the owner, shows a complete cause of action without any reference to an illegal contract."

The grounds upon which McMullen is entitled to recover in this suit have been established and repeatedly declared by this court and by other courts of the Union, both federal and state. McMullen does not ask for the declaration of any new principle of law, but simply that there shall

be applied to his case principles which are too firmly fixed to be the subject of disturbance.

Counsel for McMullen have relied upon the decision in *Brooks vs. Martin*, 2 Wall., 70, and other decisions of this court announcing the same views as those there expressed, as absolutely controlling the proper determination of this cause, and although the circuit court of appeals attempted to draw a line of distinction between the question involved in *Brooks vs. Martin* and that involved in the pending suit, our confidence in the soundness of our contention has not been in the slightest degree shaken. It was upon the ground of a departure from the rule laid down in *Brooks vs. Martin* and other decisions of this court that the writ of certiorari in this case was sought.

In his dissenting opinion in *Burck vs. Taylor*, 152 U. S., 634, Mr. Justice Jackson said on page 670:

“The attempt to draw distinctions between decisions which involve no substantial differences in principle is not only unwise, but is attended inevitably with embarrassments in the administration of the law.”

If we substitute the word “cases” for the word “decisions” above, the language used is exceedingly appropriate to the cause under consideration, and we feel assured that the court will see the fitting application of the statement to the

facts of the pending cause. We submit a review of the decisions on which we rely, for the purpose of showing the utter impossibility of distinguishing this case from those by which we contend it is controlled.

In *Brooks vs. Martin* the facts were that Brooks, Martin and Field had entered into a partnership agreement to engage in a business which this court explicitly declared to be inherently unlawful, and the fruits of the business, which became the subject of the controversy between them, were the direct wages of iniquity. Martin sued for an account of the partnership transactions and to recover his share of the profits. He prevailed, and the fundamental principles on which he succeeded were, that his cause of suit was a property right which grew out of his partnership relation with Brooks, and that his share of the profits, which were in Brooks' possession, was held by the latter in trust, and it did not lie in his mouth to question the source from which the profits had come. The corrupt agreement between the partners did not afford nor restrict the cause of suit, although it was necessarily referred to by the court for the purpose of ascertaining the proportions and manner of the division of the assets which was decreed.

Mr. Justice Miller, who delivered the opinion of the court, said (pp. 78, 79):

"We think that, in point of fact, the allegation of the answer,—that the traffic in which this firm engaged was the buying up of soldiers' *claims*, before any scrip or land warrants were issued, and not the purchase and sale of bounty land warrants and scrip,—is true. We have as little doubt that the traffic was illegal. Undoubtedly, the main object of the ninth section of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. It was a wise and humane policy, and no court could hesitate to enforce it, in a case which called for its application. If a soldier, who had thus sold his claim to Brooks, Field & Co., had refused to perform his contract, or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it, or given them any relief against him. And if they had, by any such means, got possession of the land warrant or scrip of a soldier, no court would have refused, in a proper suit, to compel them to deliver up such land warrant or scrip to the soldier. Or if Brooks, after the signing of these articles of partnership, had said to Martin, 'I refuse to proceed with this partnership, because the purpose of it is illegal,' Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, 'I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance accord-

ing to your agreement,' Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such a refusal. To this extent go the cases of *Russell vs. Wheeler* [17 Mass., 281], *Sheffner vs. Gordon* [12 East, 304], *Belding vs. Pitkin* [2 Caines, 149], and the others cited by counsel for appellant, and no further.

"All the cases here supposed, however, differ materially from the one now before us. When the bill in the present case was filed, all the claims of soldiers thus illegally purchased by the partnership, with money advanced by complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had, in many cases, been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the lands so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were then in the hands of defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier?

It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

The learned justice then cited with approval *Sharp vs. Taylor*, 2 Ph. Ch., 801, and concluded that the decree of the lower court was correct.

Now, while it is not so declared in terms, it is incontestably clear that the court decided this cause on the ground laid down by Mr. Carpenter, respondent's counsel, in his brief, that "the implied promise of the defendant, arising out of the receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction." Thus the doctrine for which we contend above as to what is to be deemed the "cause of suit" in such cases must be held to have been involved in the controversy in that suit and to have been applied in its determination.

Brooks vs. Martin followed *McBlair vs. Gibbes*, 17 How., 232, and since has been followed by this court without question, and the rule laid down

has been applied to a variety of controversies. The first case of prominence succeeding it was that of *Planters' Bank vs. Union Bank*, 16 Wall., 483. The Planters' Bank of Natchez, during the civil war, sent to the Union Bank of New Orleans a lot of Confederate securities to be disposed of for account of the former bank. This was done, and the Union Bank failing to make settlement, the Planters' Bank brought suit in a state court to recover the amount which had been realized. The Union Bank pleaded in defense that the traffic was in aid of the Confederate government and was consequently illegal. On writ of error this court said by Mr. Justice Strong (p. 499):

"Nor should the court have charged that, in the circumstances of this case, no action would lie for the proceeds of the sales of Confederate bonds which had been sent by the plaintiffs to the defendants for sale, and which had been sold by them, though the proceeds had been carried to the credit of the plaintiffs and made a part of the accounts. It may be that no action would lie against a purchaser of the bonds, or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plain-

tiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin."

And in *Railroad Company vs. Durant*, 95 U. S., 576, certain tracts of land had been conveyed in trust to Durant, as vice-president of the Union Pacific Railroad Company, in consideration of the location of the Omaha terminus of the road at a particular point. The railway company contended that the lands were held in trust for it, and, upon Durant's refusal to convey, sued to recover them. The lower court dismissed the bill upon a finding that the conveyances were obtained through an illegal exercise by Durant of his power and position, as acting president and acting manager, and that he held the land of said company in trust for the grantors. This court reversed the decree, saying (p. 578):

"The conveyances to the trustee were, in the view of the law, the same thing as if they had been

to the company. The transaction between the parties in interest was thus finally closed. There will be neither more nor less of illegality between the original parties, whether the trustee does or does not respond to his obligation to the company. In that obligation there is no pretense for saying there is any taint of any kind; and it is that obligation alone which it is sought to enforce by this proceeding."

In the ninth circuit, before the establishment of the courts of appeals, the rule of *Brooks vs. Martin* was recognized by Judge Sawyer. In *Burke vs. Flood*, 6 Saw., 220, a matter of a partnership accounting arose in a case where it was alleged that a fraud had been perpetrated by Flood and his associates upon a third person, and it is said (p. 227):

"When money has come into the hands of a partnership on a partnership transaction, however unlawfully or wrongfully acquired as between the members, it is partnership assets, and must be accounted for as such as between themselves." (*McBlair vs. Gibbes*, 17 How., 237).

The learned judge then quotes from *Brooks vs. Martin* and applies the decision to the case then in hand.

In the eighth circuit the courts have had occasion to apply the rule. In *Western Union Telegraph Company vs. Union Pacific Railway Company*, 1 McCrary, 418, 558, the complainant filed a bill

alleging a contract between the parties, whereby the complainant had the right to maintain a telegraphic line along the defendant's right of way, and it was alleged that defendant was interfering with the right thus conferred and threatening to cut the wires which complainant had strung, in consequence of which an injunction was prayed. The contract contained stipulations that the officers of the railway company should have free use of the complainant's wires for their private affairs, and this provision was held to be against public policy, and therefore to avoid the entire contract. A demurrer to the bill was sustained, with leave to amend. In the amended bill it was set forth that certain property rights had been acquired by the complainant under the contract, and it was contended that the court should protect these rights. This view was sustained, McCrary, J., saying (p. 562):

" Even if we assume that the contract is void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity, and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract. Such is the doctrine established by the Supreme Court of the United States."

After citing with approval *Planters' Bank vs. Union Bank*, *McBlair vs. Gibbes*, and *Brooks vs. Martin*, the opinion proceeds (p. 563) as follows :

"In *Brooks vs. Martin* it was held, upon full consideration, that after a partnership transaction, confessedly in violation of an act of Congress, has been carried out, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract. All of these cases admit the invalidity of a contract bottomed in immorality or in violation of a statute, and they all agree that where a party comes into court and asks relief upon such a contract, it must be denied. But they make a distinction between those cases in which a court is asked to enforce such a contract, and those in which a court is asked to deal with property which has been acquired as the result of the execution thereof. Such property may constitute the subject-matter of a suit at law or in equity, notwithstanding the invalidity of the contract under which it was acquired."

It will be observed that the rule of *Brooks vs. Martin* was applied in this case to property acquired under a contract which was still executory.

Another application of the same rule is to be found in *Wann vs. Kelly*, 2 McCrary, 628, where the parties to the suit, together with a third party, engaged in a stock-gambling transaction which proved profitable. Kelly got the proceeds and refused to account to Wann for his share; whereupon the action was instituted. The court (Nelson, J.) found in favor of the plaintiff, saying (p 630):

"It is urged by Kelly that the business in which the parties engaged was contrary to public policy and illegal, and therefore he can retain all the profit which resulted therefrom without recognizing his associates jointly interested, and that a court will not enforce the plaintiff's claim. Such is not the law. The agreement between the parties related to a single transaction, and when the business closed, and Kelly received the profits, he was in duty bound to pay over to the plaintiff his part of it.

"If the speculation was contrary to public policy and illegal, it had been closed, wound up, and the illegal object of it had been accomplished.

"It is settled by the United States Supreme court (*McBlair vs. Gibbes*, 17 How., 237; *Brooks vs. Martin*, 2 Wall., 70, and authorities cited) that when the illegal contract is completed, and money has been received by a joint owner by force of the illegal contract, he will not be permitted to retain it, and cannot protect himself by setting up the illegality of the transaction in which it was paid him, but must account to his associates."

In the opinion rendered by Judge Bellinger on the final hearing, in which he candidly admitted he had been misled by his first impressions of the application of certain decisions which had been cited by the respondent,—and it may be said the circuit court of appeals have construed these decisions and relied upon them just as Judge Bel-

linger did in the first instance,—he says, (record, p. 98):

“When these questions were considered by me on the exceptions to the answer (69 Fed. R., 509), I was of the opinion that it was within the principle of those cases involving agreements for a division of the fees of public offices and for compensation for services in lobbying. This, I am convinced, was an erroneous view of the question. In one of those cases the court is asked to compel by its judgment the very thing prohibited by public policy, while in the other it is asked to compel payment for a service forbidden by such policy. The question of division of profits between two parties having equal right is a very different one. The distribution of the profits of this contract, which are as much the property of one of the parties as of the other, does not violate any rule of morals or of public policy.”

We have quoted at such length from these decisions for the purpose of showing the different conditions in which the rule under consideration has been applied, governing, as it does, questions of partnership, of agency, of traffic agreements, and of general dealings of one party with another. It is held to apply as well to matters which are *mala in se* as to those which are *mala prohibita* only, and the decisions clearly point out, define and limit the instances in which such defenses as those interposed in *Brooks vs. Martin* and in the pending cause may be made available. *It is only*

when the very thing which embodies the vicious element is open and is brought before the court for action which must be predicated upon it that the defense may be made good.

Now, to the apprehension of counsel for McMullen, nothing could be more absolutely clear and free from doubt than that the rule laid down in *Brooks vs. Martin* controls the pending cause, and that the conclusion reached by the circuit court of appeals cannot stand consistently with that rule. And yet there is a marked difference in the character of the two cases. In *Brooks vs. Martin* the whole purpose and existence of the partnership was inherently unlawful; but it is not so in the pending case. The work contemplated by the city of Portland was lawful, and the city invited proposals for its performance. It was lawful for Hoffman and petitioner to combine their forces for securing and executing the work. Their partnership agreement in its objects was unobjectionable. The contract between the city and Hoffman was in itself a proper one. The only ground of attack upon the entire proceedings is that in the accomplishment of their purposes Hoffman and petitioner did an alleged illegal act, to which act, be it observed, the city of Portland has never intimated an objection. It was essentially a "transaction," in the language of the cases above cited, which was absolutely concluded prior to the 6th day of March, the date of the partnership agreement between Hoffman and petitioner, and prior

to the performance of any substantive work from which the moneys and property which constitute the subject of this suit were earned.

If *Brooks vs. Martin* was well decided, *a fortiori* the same rule should determine the pending cause in McMullen's favor.

The doctrine announced in the foregoing decisions is fully recognized and stated in Lindley on Partnership, 2d Am. ed., vol. 1, pp. *107, *108, where the learned author of that work, now the presiding judge of the court of appeal in chancery in England, says:

"*Tenant vs. Elliot*, and other cases, decided that if A. and B. are parties to an illegal contract, and B. in pursuance thereof pays money to C. for A.'s use, A. can recover this money from C. It follows from this that if two partners, A. and B., enter into an illegal agreement with C., and in pursuance of this agreement C. pays money to D. for the use of A. and B., not only can A. and B. recover this money from D., but if he pays it over to either one of the two partners, that one must account to the other for his share of it. This must also be the case if C., instead of paying the money to D., pays it over at once to A. or B. In other words, it follows from *Tenant vs. Elliot* and that class of cases, that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the partnership from such act, and the money representing that gain has

been actually paid to one of the partners for the use of himself and co-partners, he cannot set up the illegality of the act from which the gain accrued as an answer to a demand by them for a share of what he has received. Upon this principle it was held in *Sharp vs. Taylor*, that a partner was entitled to an account against his co-partner of moneys actually come to the hands of the latter from the employment of a ship in a manner not permitted by the navigation laws."

We have cited above only the decisions of the federal courts, but there are numerous adjudications in the state reports in full accord.

Hipple vs. Rice, 28 Penn. St., 406.

Wright vs. Pipe Line Co., 101 Id., 204.

Gilliam vs. Brown, 43 Miss., 641.

Willson vs. Owen, 30 Mich., 474.

Owen vs. Davis, 1 Bailey Law (S. C.), 315.

Harvey vs. Varney, 98 Mass., 118.

In *Hipple vs. Rice*, one Landis instituted a lottery to dispose of a number of lots of ground, and sold tickets based on chance. One Bigler became the purchaser of a ticket and drew a lot for which Landis made a deed, which recited the lottery and expressed as its consider-

ation "the sum of £3 lawful money to him in hand paid by the said John Bigler, at and before the ensealing and delivery of these presents, for one ticket in the above mentioned lottery." The deed also reserved an annual ground rent. The interest of both the original parties had passed to the parties in action, *and the action was brought upon a covenant of the deed to recover the ground rent reserved in the deed.* Illegality of consideration was pleaded as a defense, but it was held to be of no avail. The court said (p. 412):

"Suppose the original agreement for the sale of tickets illegal, and that the law would arrest the payment of every ticket sold under it, still, if the transaction has been consummated by a deed, can the present defendant, for his purposes, go behind it? Although it recites the agreement, I hold that it having been accepted, and possession taken under it, he is estopped from taking advantage of the recitals to enable him to evade the payment of the quit-rents mentioned in it. In *Les-tapies vs. Ingraham*, 5 Barr, 81-82, it is said, 'that, while a court will not enforce an illegal contract, yet if the parties themselves execute it, and the illegal object has been accomplished, the money or thing which was the price of it, may be a legal consideration between the parties for a promise express or implied, and the court will not unravel the transaction to discover its origin.' "

In *Gilliam vs. Brown*, 43 Miss., 641, William T. Brown entrusted to James C. Brown a lot of cotton

for sale. The transaction occurred during the war, when dealing in cotton was forbidden by the Union authorities. James C. Brown sold the cotton and failed to pay the proceeds over. He having died, William T. Brown brought an action against the executor, James O. Brown, who defended on the ground that the transaction was illegal. The court said (p. 659);

"It is not disputed that a remedy will not lie on the illegal contract itself. If J. C. Brown had obligated himself to carry W. C. Brown's cotton into Memphis, and sell it, no suit could be sustained for a non-performance. But where the illegal adventure has been accomplished, and the money arising out of it is in the hands of J. C. Brown, or his legal representative, what law is violated, what rule of public policy is infringed, what encouragement is given to the violators of the law, by compelling him to turn over the money to his principal?"

On page 664 it is further said:

"But the principle seems to be well established that after the illegal contract has been executed, one party in possession of all the gains and profits resulting from the illicit traffic and transactions, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law, and, therefore, the plaintiff, jointly interested in its profits and gains, cannot ground any claim to an account and share there-

of. All the harm that can inure to the public by an infraction of law has already accrued ; and it were to encourage hypocrisy and gross dishonesty to permit a party fresh from a violation of the law, to set up his own turpitude as a shield and protection against a division of the gains of the illicit business with one jointly entitled to share them."

So also in *Owen vs. Davis*,¹ Bailey Law (S. C.), 315, one Murray lost money at cards to Owen and Davis, and gave his note to Davis therefor. Davis realized on the note and declined to divide with Owen, setting up as a defense when sued that the consideration for the note was illegal. Speaking of the decision of the trial court, the supreme court of South Carolina said (p. 316):

"The presiding Judge was of opinion, that the illegality of the consideration, for which Murray had given his note, did not affect the question between the present parties. If Murray chose to waive the objection, it did not lie with the defendant to set it up, for the purpose of retaining the whole of the spoil to himself. One, who receives money to the use of another on an illegal contract, cannot retain it to his own use, on the ground of the illegality of the contract. *Tenant vs. Elliott*, 1 Bos. & Pul., 3 ; *Farmer vs. Russell*, Ib., 296. If the defendant had received money, of which, by an agreement between themselves, the plaintiff was entitled to one-half, it was difficult to discover any sound principle, on which the fact, that it had been received on an illegal contract, would entitle the

defendant to violate his own agreement. The money received might, indeed, be well termed the wages of iniquity; but why should one of the co-workers be permitted to add a fresh iniquity, by retaining the whole, contrary to his agreement? No good reason could be given. Murray would have been protected in refusing to pay; but as he *had* paid, the plaintiff was certainly entitled to recover his share of the fund, unless, indeed, Murray might himself recover back the whole."

The supreme court simply said (p. 320):

"We concur in the views taken of this case by the presiding Judge."

In *Willson vs. Owen*, 30 Mich., 474, the parties to the action, with others, organized a horse fair association and conducted races and pool-selling upon which they made money. Owen was treasurer and refused to divide the earnings of the enterprise with his associates. When sued he set up as a defense the illegality of the operations through which the earnings were made. He lost his case below. On appeal, Cooley, J., speaking for the court, said, (p. 475):

"We also think the court below decided correctly in overruling the objection to the action on the ground that the moneys demanded were received in the prosecution of an unlawful undertaking. It is true that the trials of speed for

money at the horse fair, and the selling of pools under the auspices of the association, were illegal; but there is no illegality in the promise, express or implied, of the defendant, to pay over to the plaintiffs the moneys received for them from whatever source derived, or from whatever transactions springing. In *Bronson Agricultural, etc., Association vs. Ramsdell*, 24 Mich., 441, the attempt was made to enforce the illegal contract by a suit to recover the moneys promised by it; but this suit involves no such attempt. The illegality of this association only appears incidentally in explaining whence the moneys were received; but the ground of recovery is that the moneys were received for the plaintiffs, and it is not material how or on what account they came to his hands, if in fact for the plaintiffs' use. The distinction between such a case and one in which the suit seeks the enforcement of the illegal contract is well pointed out by *Mr. Justice Nelson* in *McBlair vs. Gibbes*, 17 How., 235, 239, where *Tenant vs. Elliott*, 1 B. and P., 3; *Farmer vs. Russell*, 1 B. and P., 296; *Thomson vs. Thomson*, 7 Ves., 470; and *Sharp vs. Taylor*, 2 Ph. Ch., 801, are cited with approval. See also *Brooks vs. Martin*, 2 Wall., 70; *Murray vs. Vanderbilt*, 39 Barb., 141. These cases are directly in point, and meet with our approval."

In *Harvey vs. Varney*, 98 Mass., 118, the suit was for an accounting between partners. The partners who were made parties defend-

ant therein contested the plaintiff's claim on the ground that the property with which the firm had been operating, was acquired by the firm through a conveyance made to defraud the creditors of the prior owners of the property. The supreme court said (p. 119):

"We are satisfied that the firm of Varney & Harvey was formed in part at least for the purpose of transferring to it the property of the former firm of Hunt & Lane in order to hinder, delay and defraud its creditors; that the property sold to it by Hunt & Lane was intended to be concealed and covered up from attachment; and that the interests of Hunt & Lane in the new co-partnership of Varney & Harvey was kept secret, and their names were omitted from the books of the new firm as co-partners, with the same view and design and that all this was done with the knowledge and participation of the plaintiff.

"These facts being established, it is insisted on behalf of the defendants that the whole business was fraudulent and illegal, and that a court of justice will not interfere, between parties equally guilty, to adjust their controversies and apportion the shares to which they are respectively entitled accruing from a fraudulent, illegal and immoral enterprise. The principle invoked is well established, founded upon the highest considerations of public policy, and its maintenance is essential to the dignity of judicial tribunals. Within proper limitations it receives our cordial assent."

And further on in the opinion in that case (p. 123) it is said:

"The result is, that the defendants in equity cannot be allowed to prove that the stock taken from the old firm of Hunt & Lane by the new firm of Varney & Harvey, was transferred to conceal it from attachment; and the notes given therefor are held to be valid.

"The question whether an account between the members of the new partnership should be refused, and each be allowed to retain the share which happens to remain in his hands, without regard to equality, depends upon similar principles.

"There was no element of illegality or immorality in the business of the firm. Because the plaintiff's interest was that of a silent partner, and was kept concealed in order that it might not be attached by his creditors, the defendants who participated in this purpose cannot be allowed to disclose the common fraud of both parties and thereupon appropriate to themselves his share of the capital and profits of the partnership. Except so far as creditors intervene to assert their rights, the interests of the several partners must be adjusted as if no such fraudulent purpose existed. To hold otherwise and to apply to this case the maxim, *in pari delicto potior est conditio defendentis*, would be to exercise rigor beyond the limits of wholesome severity."

The rule applied in the case last quoted from is exactly applicable to the facts appearing in the case at bar. There, as here, the partnership was for a lawful purpose, and collateral matter was sought to be availed of, which was only indirectly connected with the cause of action asserted, in order to defeat a recovery.

Let us apply the principle so universally recognized in the above decisions to the pending case, and analyze the distinction attempted to be drawn by the circuit court of appeals. In their opinion it is said, (record pp. 611-2):

"The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, but his case may be

proved without reference to it, then he is entitled to recover.

"The doctrine of *Brooks vs. Martin* and kindred cases is, and always should be, applied in cases where the fraud complained of is between individuals, which does not in any manner affect the public interest. If McMullen and Hoffman had agreed to continue their partnership, by investing the profits received by Hoffman under the illegal contract in the purchase of property, mortgages, bonds, or other securities, neither of them would be permitted, as against the other, to set up the fact that the money so invested was derived as profits from an illegal transaction, in which the rights of the public were involved. Numerous instances are found in the books which present the distinction existing between the two lines of cases under consideration in a very clear light."

The court here lay down as cases in which a party cannot recover money connected with an illegal transaction the following:

1. Those in which the plaintiff is obliged to show the illegal contract or transaction in presenting his case.
2. Those in which he must make out his case through the medium of the illegal contract or transaction.
3. Those in which it appears he was privy to the original illegal contract or transaction.

The single instance in which he may recover is said to be where there is a new contract, remotely connected with the illegal contract or transaction, and the right to recover is not dependent upon that contract, *but the case must be proved without reference to it.*

The second only of the above propositions is sound.

In *Brooks vs. Martin* the plaintiff was obliged to show the illegal contract, because it measured the amount of his recovery and was indispensable evidence. So, in many cases, although the plaintiff's cause is not grounded upon the illegal contract, he may have to resort to it in evidence for a like purpose, or to identify the subject of the suit, or to establish the time within which something was to be done. An unstamped deed, where a stamp is required, cannot be used to support a claim to the property attempted to be conveyed, but it may be referred to in evidence for a description of the property, or to show when possession of the premises commenced. It is therefore error to say that no recovery can be had where the plaintiff in making his case is simply required "to show" the illegal contract.

Frost vs. Plumb, 40 Conn., 111, cited above is exactly in point. The court say (p. 113):

"We understand the rule to be this:—the plaintiff cannot recover whenever it is necessary for him to prove, *as a part of his cause of action*,

his own illegal contract, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, *although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case*, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal." (Last italics ours.)

Note also the case of *Hipple vs. Rice*, *supra*, where the suit was brought upon a deed which had emblazoned on its face the obnoxious matters which were urged in defense of the recovery sought.

In every one of the cases cited by us it was made to appear, in one way or another, that the plaintiff was privy to an "original illegal contract or transaction," and yet a recovery was not precluded by reason thereof.

The single instance in which, under these rules, the court of appeals allow that a recovery may be had would have absolutely cut off all recovery in *Brooks vs. Martin*.

The circuit court of appeals say in the quotation made above from their opinion:

"The doctrine of *Brooks vs. Martin* and kindred cases is, and always should be, applied in cases where the fraud complained of is between individuals, which does not in any manner affect the public interest."

Inferentially, of course, it was the view of the court that this doctrine did not apply to cases where the public was concerned; *ergo*, that it had no application to the pending suit.

Conceding for the argument that in the matter under consideration the city of Portland stood for the public, we ask in the name of reason if the public interest was not affected in *Brooks vs. Martin* by the parties violating an act of congress, or in *Hipple vs. Rice* by their violating a statute of Pennsylvania; was not the public interest concerned in *Planters' Bank vs. Union Bank* and in *Gilliam vs. Brown*, where the parties were dealing in securities and property contraband of war; was not the public interest touched in *Railroad Company vs. Durant* and *Western Union Telegraph Company vs. Union Pacific Railway Company*, where officers of corporations were guilty of making a private advantage out of their positions at the expense of their associates?

From such a narrow and faulty conception of the doctrine of these cases, it need not be a matter of surprise that the circuit court of appeals thought they were not applicable to the pending controversy.

In every one of these cases the question of public policy was presented and in every one of them it was recognized that this question would have led to a different result in some other stage or aspect of the controversies. It was as present

in every one of them and as pertinent to their determination as it is in the pending suit.

What is public policy, and under what circumstances may the plea be invoked? We say that public policy is public morals. If there were any distinction between public and private transactions in the matter of its application we should say that it was primarily applicable, to matters of the first class, but there is no distinction. It is applicable to both classes alike, and to neither, except when some beneficial lesson is to be enforced by the application. It is never applied where the primary wrong being beyond reach, its enforcement would but aid in the perpetration of another.

In *Greenhood on Public Policy*, 2, the author says: "No judge better expressed the importance of the element of public policy in the law than did Wilmot, C. J., when he said: 'It is the duty of all courts of justice to keep their eye steadily upon the interests of the public, even in the administration of commutative justice; and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give no countenance or assistance *in foro civili*.'

"And another court thus expressed itself: 'We may take it as well settled that, in the law of contracts, the first purpose of the courts is to look to the welfare of the public; and if the en-

forcement of the agreement would be inimical to its interests, no relief could be granted to the party injured, and even though it might result beneficially to the party who made and violated the agreement.'"

We take *Brooks vs. Martin*, for purposes of illustration, as a type of the decisions which we have cited. The effect of the act of congress declaring that sales of scrip were void was to make such sales unlawful, and Mr. Justice Miller says that "the traffic in which this firm engaged" was "illegal." Therefore both the partnership agreement and the operations of the firm were unlawful. The subject of their operations, out of which they made their profits, were under the ban of law. The parties were violating public policy and it was involved in the case, for every infraction of law is obnoxious to public policy.

Counsel for respondent attempt to argue, as if it were a distinction of consequence, that in *Brooks vs. Martin* the parties acquired by fraudulent practices their stock in trade which is denominated a "transaction," which did not affect their subsequent operations; while in the pending cause the action of the parties was an inherent part of their contract, constituting a thread which runs through the entire course of their joint operations, and vitiates everything. We think we have conclusively demonstrated that upon respondent's theory the cases are entirely undistinguishable. The matters to which excep-

tion was taken occupy identically the same relation to the other transactions of the parties in the one case as in the other, and if they could not defeat a recovery in *Brooks vs. Martin*, neither can they do so here.

If there was any turpitude in the action of Hoffman and McMullen in the submission of their bids, so far as Hoffman was concerned this was beyond the reach of the court when this suit was brought, for the matters now assailed had been completed and Hoffman had placed beyond recall McMullen's interest in their joint venture.

The learned circuit court of appeals in their opinion undertook to disapprove, apparently upon ethical grounds, of this proposition when it was submitted to them. They say (record, p. 613):

“The learned counsel for appellee, recognizing the force of the reasoning of the authorities, admits, for the purpose of his argument, that if, after the award was made to Hoffman, he had refused to enter into the partnership arrangement, McMullen could not have compelled him so to do, nor collect any damages for his refusal, ‘because the grounds then existing as the basis of appellee's claim would have been that he had rendered service in securing the award, and, necessarily counting upon that service, he would have had to bring it into the court, and its character would have been a subject for investigation. But when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead

letter.' If this position could be maintained it would furnish a very convenient way for escaping the penalty which the law imposes upon all persons who have secured contracts in an illegal and unlawful manner. A contract secured by corrupt means—the bribing of public officers, buying off all rival bidders, thus stifling all competition where contracts are to be let to the lowest bidder—could always be enforced by a simple agreement of partnership by parties guilty of the fraud. The fraud, under this rule, is a thing of the past—has become 'a dead letter,' or is made honest by a single stroke of the pen, creating a new agreement to share and share alike in performing the illegal contract."

We repeat the assertion that "when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead letter," and we will demonstrate it.

Assuming the respondent's contention as to the transaction between Hoffman and McMullen to be true, for the sake of the argument, the fact remains that when they had despoiled the city, if you please, and had secured a right to the contract which yielded the money in suit, Hoffman did not stop and decline to go further with McMullen. He entered into the engagement of March 6, which was in effect an equitable assignment to McMullen of a half interest in the contract to be entered into between himself and the city of Portland; he delivered to McMullen his

share of the booty in the only way in which it was capable of delivery, and thereafter he stood to McMullen as a trustee of his interest in the city contract, and everything which might be earned under it, and was bound to account to his *cestui que trust* just as any other trustee would have to do in regard to trust property.

In Lewin on Trusts, p. 68, it is said:

"If the settler proposes to *convert himself* into a trustee, then the trust is *perfectly created*, and will be enforced so soon as the settler has executed an express declaration, of trust intended to be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable, whether it be capable or incapable of transfer."

In Parsons on Contracts, p. 224, speaking of the assignment of *choses in action*, the author of that work says:

"Such an assignment is regarded in equity as a declaration of trust, and an authorization to the assignee to reduce the interest to possession."

So, also, in *McDaniel vs. Maxwell*, 21 Or., 202, 205, speaking of equitable assignments, the court said:

"By such an assignment the assignee obtains an interest in the property or fund, and not simply

a right of action against the drawee. * * *
 No particular form of words or particular form of instrument is necessary to effect such assignment. Any binding appropriation of it to a particular use is an assignment, or what is the same, a transfer of the ownership."

To the same effect is *Spain vs. Hamilton's Admr.*, 1 Wall, 604, 624, in which this court said:

"Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity."

In *Smith vs. Hubbs*, 1 Fairf., 71, 76, the supreme court of Maine said:

"There is a marked and settled distinction between *executory* and *executed* contracts of a *fraudulent* or *illegal* character. Whatever the parties to an action have *executed* for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally *contracted to execute*, the law refuses to compel the contractor to execute or pay damages for not executing; but in both cases leaves the parties where it finds them."

In *Ownes vs. Ownes*, 23 N. J. Eq., 60, the complainant brought suit for a re-conveyance of cer-

tain real property which she had conveyed to her son James H. Ownes, he having executed a declaration that he held the property in trust for her. The defendants, who were the administrators of the estate of James H. Ownes, then deceased, alleged that the property was conveyed to James H. Ownes by the complainant for the purpose of delaying and defrauding her creditors, and it was contended, that such being the case, the court could not grant the relief sought. But the supreme court said (p. 62):

"If the instrument executed by James had been a mere contract to re-convey the property, or the bill had been filed to establish a trust, either as a resulting trust, or on a parol agreement, the defense would be a bar to the relief. A court of equity will not enforce an executory contract when the consideration is founded on fraud, or is *malum in se*, or *malum prohibitum*. It would not create a trust in such case. But here the trust is declared by a writing executed and delivered. The estate is vested in the complainant, and the object of the suit is to compel a naked trustee to convey the property held in trust to the *cestui que trust*—to perform an existing trust.

"Courts of equity, in the analogous cases of contracts and conveyances without consideration, have recognized and established this distinction between conveyances and executory contracts: Where the title is vested, they never avoid it for

want of consideration. And, on the other hand, they never enforce an executory contract without consideration; they treat it as a nullity. * * *

"The maxim, *in pari delicto, potior est conditio possidentis*, protects the title actually vested in the complainant. If the legal estate had been re-conveyed to the complainant, the title could not have been affected by the fraud of the transaction from which the conveyance arose. And the rule must be the same when the equitable estate has been actually vested by a proper conveyance. I know of no case in which a court of equity has refused to enforce a trust actually declared and vested, on account of fraud in the conveyance to the trustee who declared the trust."

Was not the effect of Hoffman's signing the partnership agreement to fully consummate the alleged fraudulent transaction upon which the respondent bases her defense? Did not the "stroke of the pen" perform a substantive office here? And does not the attitude of the respondent call upon the court to exercise affirmative action on her behalf in undoing what Hoffman had done?

Hoffman by signing this agreement supplied McMullen with the means of proof of his interest in the contract with the city. They had gotten past the illegal feature of their operations. Suppose Hoffman and McMullen had joined in a sale of their contract with the city to a third person and the money had been paid to Hoffman, would

the matters which he set up in this case have been any defense to an action brought by McMullen for his share of the proceeds? And how does the case differ because instead of doing this they worked out the contract and the money earned was paid over to Hoffman by the city?

May we not go even another step and say that, inasmuch as the further business to be performed by Hoffman and McMullen was unobjectionable, if no joint action had thereafter been taken between them, but Hoffman having the contract with the city in his name had himself sold it to a third person and realized a sum of money upon the sale, could not McMullen have sued for his interest, giving in evidence the partnership contract as supporting his demand, and recovered? The authorities cited above, leading up to and including the New Jersey decision, certainly support this proposition and we see no reason to question its soundness.

We thus see that if the action of the parties had not gone to the extent of giving McMullen a right to recover upon the hypothesis first presented, he could have made his approach by this additional line of argument and equally have secured his interest in the contract.

The authorities relied upon by the circuit court of appeals as a basis for their decision are clearly to be distinguished from the pending case and are inapplicable to the true issues joined herein.

It would not be worth while to review all the authorities which are cited in the opinion of the circuit court of appeals as the basis of their decision, and we shall therefore content ourselves with an examination of those which seem to have appealed most forcibly to the court. The first and strongest of these cases apparently is that of *Atcheson vs. Mallon*, 43 N. Y., 147. Of this case the circuit court of appeals say (record, pp. 602-3):

"This case, in principle, cannot, in our opinion, be distinguished from *Atcheson vs. Mallon*, *supra*, although the facts here as to the illegal character of the transaction are much stronger than in that case. There the parties simply showed each other their bids, and agreed to divide the profits. Mallon was the lowest bidder, and obtained the contract. The money due on the contract when completed was paid to him. The profits amounted to \$400. Mallon refused to divide. Atcheson brought suit to recover his share of the profits. The court refused to enforce the contract. After announcing the general rule which we have stated, and declaring the general principles applicable thereto, the court said:

"If Mallon had promised Atcheson a sum of money if he would refrain from making any proposal, and Atcheson, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any consideration for the parties to it, but be-

cause its effect was to remove Atcheson from the number of earnest bidders, and thus, by lessening competition, to detriment the public. And the agreement which was made, laying open to Mallon just what was the judgment of Atcheson of a profitable bid, and removing, in effect, an interested rival, tended to affect Mallon's action; while Atcheson, confident that, if Mallon succeeded, it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce.' "

Conceding that this case was well decided, we submit that the circuit court of appeals were mistaken in accepting it as a guide for their action in the pending cause. The statement of facts given in the report is this:

"The action was for an accounting, and the payment to the plaintiff of his share of the profits realized by the defendant on a certain contract with the town of Oswegatchie, St. Lawrence County, for the collection of the taxes assessed upon that town.

"By an act of the legislature passed March 9th, 1866 (Sess. Laws of 1866, vol. 1, p. 244), the board of town auditors of that town were authorized to receive sealed proposals for the collection of the taxes of that town, and award the collection

thereof to the person offering terms most favorable to the town.

"The board accordingly advertised, and, among others, both the plaintiff and the defendant put in proposals. Their proposals were seen by both the parties, before they were sent in, but it did not appear that any change was made in either of them, in consequence of the knowledge by one bidder of the proposal of the other.

"At the time the proposals were sent in to the board of auditors, the plaintiff and defendant agreed that, if either obtained the award of the collection of taxes, both should share equally in the profits and be liable to an equal share of the losses.

"The contract was awarded to the defendant, who went on under it and collected the taxes at the rates stated in his proposal."

Now it is perfectly manifest that these parties never launched their proposed partnership, if indeed it can be termed a partnership. We are told that the *defendant* went on under the contract and collected the taxes, and that the *defendant* realized the profit. There is not the slightest suggestion that the defendant had ever recognized the plaintiff in any manner whatever after they entered into their *agreement to become partners*; the parties had not performed the work together, nor does it appear that they ever intended to do so; and they had never sustained any

such *relationship* as partners as would raise an implied promise on the part of the defendant to pay over to the plaintiff any part of the earned profit. The action was brought on an *agreement to stand to each other in the matter of profit and loss as partners*, and the very authorities upon which we rely for a recovery in this case show that upon such a cause of action as that no recovery can be had. The decision is in nowise opposed to the principle involved in our authorities, and presents no ground for denying McMullen's right to a decree. Read in the light of the facts to which it applies, as it must be, this decision carries no weight in the determination of the controversy before the court.

Take the case of *Swan vs. Chorpennig*, 20 Cal., 182, which the circuit court of appeals say (record, p. 601) cannot "be distinguished in principle" from the case under consideration. The character of the controversy as given in the report is introduced with this statement: "The contract, *for the breach of which this action is brought*, was a verbal one, and is stated in the complaint as follows." Thereupon is given a copy of the complaint, from which it appears in brief that both parties were mail contractors, that plaintiff had submitted a bid on a certain mail route which he agreed to withdraw, so as to throw the contract to defendant, in consideration that the defendant would divide with him the contract price for carrying the mail, or would pay him an equiva-

lent in money. The plaintiff carried out his part of the contract, but the defendant refused to perform his promise, and the plaintiff sued him for breach of his contract. Here nothing further had been done between the parties, and when the plaintiff sued on this contract the defendant had only to plead that the contract was grounded upon an illegal consideration.

Referring to the two cases last considered the circuit court of appeals say (record, p. 603):

"Equally strong in its similarity as to the effect of the agreement between the bidders is the case of *Hannah vs. Fife*." [27 Mich., 172]. This is quite true, for this decision has no more bearing upon the controversy than the other two. The action was brought directly on a contract which expressed on its face all the details of the transaction which were held by the court to be fraudulent, the stipulations were wholly executory, and they constituted the sole consideration for the contract. The fraudulent practices which were held to defeat a recovery were immediately and necessarily brought into court by the plaintiff in seeking the relief he prayed, and they entered directly into his cause of action,—in fact the fraudulent contract furnished his *cause of action*. The opinion recites (p. 177) that, "the introduction of the contract in evidence was objected to on this ground," *i. e.* that it disclosed the fraud and the plaintiff's reliance on it; or, in other words, the point was made that the plaintiff could not

get before the court without showing his fraud and asking the court to administer upon it. The court being required by the exigencies of the plaintiff's case to pass judgment on the executory provisions of this contract, held that it was void and would not support the action.

King vs. Winants, 71 N. C., 469, would seem to have made a strong impression upon the circuit court of appeals, as its language is freely borrowed in their opinion. The recital of the facts is given in the opening of the opinion as follows :

“The care and maintenance of certain sick persons in the service of the United States, and of the sick of the city of Wilmington, and of the county of New Hanover, were let to the lowest bidder by the several governments, and the plaintiff and defendant, who were rival bidders for the same, entered into a contract not to bid against each other, so as to enable one or both to get the contract at a much higher rate, and divide the profits between them. It is not denied that this was a fraud upon these governments, and against public policy, and that the contracts could not have been enforced against those governments. But the contracts having been performed by the governments, and the parties coming now to settle the profits between themselves, and being unable to agree, it is insisted that the aid of the courts may be invoked. And whether that can be, is the question.”

Now, for aught that appears here, the parties were in the same situation that Atcheson and Mallon occupied towards each other. It does not appear that they had performed the work together,—that they had ever assumed the relation of partners,—or that the defendant had recognized the plaintiff as an associate at any time after they had entered into the contract. Quite apparently here, as in *Atcheson vs. Mallon*, the plaintiff sued the defendant *on their agreement to become partners*, which constituted his cause of suit, and the defendant pleaded to this contract that it was grounded upon an illegal consideration. It is only in a suit of this character that any room would have been afforded for the language of the opinion wherein it is said (p. 471): “We are asked to go into all the transaction and hear all the evidence and even their own conflicting statements as to the precise manner in which they bargained with each other, and which was most faithless to the other, and which got the best share of the spoils, and to help them make a just division.” When the circuit court of appeals adopted this language and applied it to the pending case, they failed to note the manifest difference in the facts of the two cases. The language of the North Carolina court was all right as applied to the case before them, but it was quite out of place when applied to the case before the circuit court of appeals. We pass this opinion upon *King vs. Winants*: That if the facts of the case

are as they appear to be from the report, it is easily to be distinguished from *Brooks vs. Martin* and from this case, and it was rightly decided; if they go beyond the recital in the report, the decision is at variance with *Brooks vs. Martin* and is wrong.

The circuit court of appeals adopt this illustration given by the North Carolina court as affording a test by which the pending cause is to be judged (record, p. 612):

"Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler, the other rifles his pocket of \$1,000, and then refuses to divide; and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now, if these robbers had taken the \$1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks vs. Martin*, *supra*, so much relied on by plaintiff."

If any parallel can be drawn between a case involving a flagrant breach of the peace and an

infraction of a criminal statute, and a case in which a general offense against public policy is presented, we submit that this illustration makes for McMullen. Under the rule laid down in *Brooks vs. Martin* and the facts of that case, an investment of the proceeds having actually been made and a profit earned, it is entirely immaterial whether these men originally entered into a conspiracy both to rob and to invest the proceeds of their robbery, or whether they agreed in the first instance only to rob, and the investment of the proceeds did not come under consideration until after they had realized them. *Brooks vs. Martin* covers the first aspect of the case and necessarily covers the second. The case, as stated, is a good illustration of the point to which it is addressed, but it does not help the respondent at all. The first contingency is *Atcheson vs. Mallon*, the second *Brooks vs. Martin* and this case. The illustration may also be taken as giving further point to the conclusion that King and Winants did not go beyond the stage of an original agreement to procure their contracts by fraudulent means, and had not jointly performed these contracts, nor entered into the relationship of partners in connection with them.

The decisions reviewed above are typical of all those relied upon by the respondent and adopted by the circuit court of appeals. In all of them there was a direct and successful agreement to stifle competition; and we believe we are safe in

making the assertion that in all the cases cited by counsel for respondent the subject of the suit was so closely connected with the fraudulent transactions involved, that the plaintiff was compelled to bring them before the court as the ground of his claim, or else there was presented the simple case of a promise founded on an illegal consideration which the defendant was allowed to plead.

We do not deny that the cases were well decided, but they are in no sense whatever inharmonious with those upon which we rely, the difference between the two classes of decisions being that those cited by respondent, when rightly understood, have no application to the facts of the pending cause, while those cited by us absolutely control it. In passing upon the questions before them, the courts in the adjudications cited for respondent lay down general principles which at first blush seem to apply to the case in hand, and they were so accepted in the first instance by Judge Bellinger; but of course their force depends entirely upon the conditions to which they apply, and when this dissimilarity of conditions is taken into account the inapplicability of the decisions is at once seen. A failure to discriminate in this respect led the learned circuit court of appeals into an error.

The respondent's view of the character of the association which existed between Hoffman and McMullen cannot lead to any different result

from that which must follow the interpretation of their relationship contended for by McMullen.

In an earlier part of our argument we alluded to the fact that the parties disagree as to the manner or extent in which the matters brought into the case by respondent, entered into the relationship between Hoffman and McMullen. The disagreement is this :

McMullen contends that the object and scope of his two engagements with Hoffman, or conceding them to be one for the sake of the argument, were to accomplish legitimate ends,—that they entered into a lawful association to execute a contract with the city of Portland for work which was unobjectionable in its character,—and that if there was any semblance of truth in the matters set up by the respondent as a defense, it was at most the performance of an illegal act in the prosecution of a legal business; that it was a *transaction* incidentally connected with their *contract*. On the other hand, the respondent contends that the manner of bidding and the objects which she says were had in view between McMullen and Hoffman entered into and became part and parcel of their partnership contract. If the contention of the respondent could be accepted, its only effect would be to establish a similitude between the facts of this case and those of *Brooks vs. Martin*, and possibly to fasten the application of that decision more securely upon this controversy. McMullen contends that, upon his theory,

the rule laid down in *Brooks vs. Martin* must govern, although there would be far more reason for applying the rule to his case than there was for applying it to that controversy; while, upon respondent's theory, it would still be absolutely impossible for her to escape from this rule.

We understand the idea of respondent's counsel to be this:—That Hoffman and McMullen entered into a contract to do two things,— (1) secure a contract from the city of Portland by fraud, and (2), to perform this contract when secured; that one partnership agreement covered the whole scope of the operations which were contemplated and executed between them; and that the illegal feature of their agreement contaminated the whole and rendered the entire partnership association, and every part of it, void and unenforceable between the parties.

In answering this contention we will not be understood as abandoning in any degree our position that the partnership contract is not the cause of suit, that McMullen is not suing upon the contract for its enforcement, but is suing to recover his interest in a fund which was earned jointly by Hoffman and himself acting in the relationship which the partnership contract contemplated they would enter into.

It will be borne in mind that in *Brooks vs. Martin* the partnership contract was exactly what the respondent claims the contract in this case

is,—the parties were to secure soldiers' land claims in violation of law and dispose of the lands and divide the profits, which last things in themselves violated no law.

Taking up this contention of respondent and going back to the original engagement between Hoffman and McMullen, we submit that if there had been any fraud or illegality in that portion of their agreement by which they were to bid jointly, this would not affect the other portion by which they were, if they got a contract, to become partners for the performance of the work, conceding, for the sake of the argument, that the suit is based on the contract.

The two portions are quite distinct and separate, and might, if it had been so desired, have been embodied in separate contracts, made at different times. That such is the case is quite clear when it is considered that if, after the contract for manufacturing and laying the steel pipe had been awarded, Hoffman and McMullen had sublet all of the work, or had sold and assigned the contract to a third party, there would then have been no necessity whatever for them to become partners in order to perform the contract. On the other hand, if the contract for manufacturing and laying the pipe had been awarded to some party other than Hoffman and McMullen, and they had bought the contract from the party to whom it was awarded, they could just as well have become partners and performed the work of

manufacturing and laying the steel pipe, as they could have done, had the contract been awarded to them.

And the promises of Hoffman and McMullen, which constituted the consideration in each of said portions of their agreement, were also distinct and separate, the promise in one portion being absolute, viz., to bid jointly; whilst in the other portion the promise was conditional, viz., if a contract should be awarded on a joint bid put in by them, they would become partners for the performance of the work.

Hence, each portion of said agreement between Hoffman and McMullen was readily severable from the other, and each was substantially a distinct contract which could, if necessary, be enforced quite independently of the other.

In *Oregon Steam Navigation Co. vs. Windsor*, 20 Wall, 70, 71, it is said :

"And the question arises whether the contract is so divisible in relation to the California portion that it can stand for the seven years for which the Oregon company is bound, though it be void as to the remaining three years. We think it is so divisible. It is laid down by Chitty as the result of the cases, and his authorities support the statement, 'that agreements in restraint of trade, whether under seal or not, are divisible; and, accordingly, it has been held that when such an agreement contains a stipulation which is capable

of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether.' The cases cited in support of this proposition are *Chesman et ux. vs. Nainby*, [2 Strange, 739], *Wood vs. Benson*, [2 Crom. & Jer., 94], *Mallan vs. May*, [11 Meeson & Welsby, 653], *Price vs. Green*, [16 Id., 346], *Nicholls vs. Stretton*, [10 Queen's Bench, 346]. In *Price vs. Green* the contract was not to exercise the trade of a perfumer in London, or within six hundred miles thereof; and it was held divisible and good for London only. This case was carried through all the courts. In *Nicholls vs. Stretton* the stipulation was that an attorney's apprentice, who was to serve five years, should not after his term expired, be concerned, as attorney for any persons who had, previous to the expiration of said apprenticeship, been a client of the attorney with whom the contract was made, or who should at any time thereafter become his client. It was strenuously and fully argued that whilst the contract might have been good as to past clients it was certainly not good as to future ones, and being an entire contract, the whole was bad. But the court followed the previous decision of the Exchequer Chamber in *Price vs. Green*, held the contract divisible, and sustained the action. We see no reason why this principle should not be followed in the present case. The line of divis-

ion between the period which is properly covered by the restriction and that which is not so, is clearly defined and easily drawn. It is subject to no confusion or uncertainty, and the court can have no difficulty in applying it."

And in *Pickering vs. R. R. Co.*, L. R., 3 C. P., 235, Willes, J., said (p. 250):

"The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."

So, also, in *Bank of Australasia vs. Breillat*, 6 Moore's P. C. C., 200, it is said:

"From Pigot's case (6 Coke's Rep., 26), to the latest authorities, it has always been held, that, when there are contained in the same instrument, distinct engagements by which a party binds himself to do certain acts, some of which are legal, and some illegal, at common law, the performance of those which are legal may be enforced though the performance of those which are illegal cannot."

And in *Treadwell, vs. Davis*, 34 Cal., 601, one Thompson turned over certain property to the plaintiff, Treadwell, under an agreement that he

should hold it as security for the payment of the amount due him, and should hold the balance for Toland, another creditor of Thompson, as security for the amount due him. It was claimed by another creditor of Thompson, represented by the defendant, as sheriff, that the agreement between Thompson and Treadwell was void, as being an assignment for the benefit of creditors, in contravention of the insolvent laws, and that he could take the property under an execution against Thompson. But the supreme court held otherwise, and said (p. 605):

“For, if the plaintiff’s agreement to hold the surplus for Toland were conceded to be void, as in contravention of the Insolvent Laws, it would not invalidate the plaintiff’s lien. The contract consisted of two distinct parts, readily severable, They are not so united that they must stand or fall together. In such cases the rule is well settled that the court will enforce that part of the contract which is valid. We have seen that the plaintiff acquired a valid lien for his own protection, which entitled him to the possession of the property; and if that part of the contract which related to the surplus be void, the other was not thereby invalidated.”

Again, in *Erie R. R. Co. vs. Union L. & E. Co.*, 35 N. J. L., 240, it is said (p. 245):

“ * * * Let it be granted that the provision in question is illegal, and therefore void,

still such concession cannot, in the least degree, impair the plaintiff's right of action. The suit is not for a breach of this promise of the defendants, that no other cars but those of the plaintiffs shall be employed in this branch of the carrying business, but it is for the refusal of the defendants to permit the plaintiffs to transport locomotives and tenders, according to their contract, over the railway of the Erie Company. This latter stipulation, the violation of which forms the ground of action, is distinct and entirely separable from the former one, in which it is alleged the illegality before mentioned exists. Admitting, then, for the purpose of the argument, the illegality insisted on, the legal problem plainly is this: whether, when a defendant has agreed to do two things, which are entirely distinct, and one of them is prohibited by law, and the other is legal and unobjectionable, such illegality of the one stipulation can be set up as a bar to a suit for a breach of the latter and valid one. This point was but slightly noticed on the argument; nevertheless, an examination of the authorities will show that the rule of law upon the subject has, from the earliest times, been at rest. It was unanimously agreed, in a case reported in the Year Books, 14 *Henry VIII.*, 25, 26, that if some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some good and lawful, that in such case, the covenants or conditions which are against law are void *ab*

initio, and the others stand good. And from that day to this, I do not know that this doctrine, to the extent of its applicability to this case, has anywhere been disallowed."

It is clear, therefore, that if there had been any illegality in the agreement between Hoffman and McMullen to bid together, or any fraud on their part in obtaining the contract with the City of Portland, that could not affect the validity of their agreement to become partners if a contract should be awarded, or have any effect upon the partnership obligations or transactions in the business of manufacturing and laying steel pipe and doing other work in connection with the construction of water works for said city. On this theory of the case, it can be positively asserted, that if such had been the cause of suit, Hoffman and McMullen having voluntarily performed the illegal part of their contract without asking the aid of any court in the matter of its performance, that engagement is out of the case and could not enter into a suit which asked only the enforcement of legal stipulations.

We now submit that the record entirely fails to show anything in the transactions or contract between Hoffman and McMullen which was actually or constructively fraudulent, and that there is nothing in the record which can upon any hypothesis be taken as affording any ground for denying to McMullen his interest in the fund in suit.

The great difficulty which counsel for McMullen have experienced upon this branch of the case has been to get counsel for respondent to point out in just what particular the alleged fraud between the parties is to be found. It has at one time been located in the bidding, at another in the contract between the parties, and again in the contract between Hoffman and the city of Portland, both of which have been characterized in this connection as "illegal" contracts. The answer charges these transactions as embodying the fraud which Hoffman pleaded in defense, viz:

1. That in order that Hoffman and McMullen might get a contract at the highest possible figure, they agreed that each party should bid an amount known to both.

2. That in pursuance of this agreement Hoffman submitted a bid \$13,000 lower in amount than he had previously intended bidding, and McMullen put in a bid \$98,000 higher in amount than he had previously intended bidding.

3. That the parties intended by their action to require the city of Portland to pay more for the work than it would otherwise have been required to pay.

4. That the parties arranged their bids on the various classes of work, so as not to operate as competing bids, while appearing to be so.

5. That in bidding on the item of manufacturing and laying the pipe and the item of furnish-

ing the plates, it was agreed that if Hoffman's bid should be the lowest on the first, and McMullen's the lowest on the second, with Hoffman's bid on this item as next lowest, McMullen would decline to accept the work on his bid and thereby induce the city to take Hoffman's higher bid, and so with other portions of the work.

6. That "complainant" (McMullen) being desirous of getting a contract on the submerged pipe, had proposed to Hoffman to resort to fraudulent practices to accomplish his end.

This is all there is of the answer, and the last charge was stricken out of the case by the trial court.

The charges of fraud in the record, therefore, are, that McMullen and Hoffman so arranged their bids as to make the city pay a higher price than it otherwise would have had to pay, and that they intended to effect certain combinations of bids to the city's detriment.

It will be observed that while much has been said all through this case in regard to the intention of the parties by their double bidding to mislead the city into believing that Hoffman's bid on the work in controversy was a desirable one in comparison with the much higher bid of McMullen, there is no suggestion in the answer of any such purpose.

In proceeding to answer the charges which confront us, we say that they are to be determined in the light of the following principles, viz:

1. That fraud is never to be presumed.
2. That fraud is a question of intent, either express, or to be accepted as a presumption from the character of acts.
3. That the burden of proving the existence of fraud in any transaction rests on him who alleges it.
4. That in order to prove fraud the evidence must be clear and convincing.
5. That where an act is susceptible of two constructions, one that it was honest, and the other that it was fraudulent, the former is to prevail.

We will first take up the matter of the alleged combination bidding, as that is most quickly disposed of. The whole support of the answer in this particular is to be found in the testimony of respondent's witness, Bush. He testifies as follows:

"Q. Now, have you had any conversation, or heard any conversation between Mr. McMullen and Mr. Hoffman about bidding for this work, and if so, I wish you would state what it was.

"A. Well, they had various conversations about the bidding—that they would bid together,

so as to try to get as much of the work as possible, and it was decided finally that Hoffman & Bates' bid should be the lowest, or lower than the San Francisco Bridge Company's bid for the manufacturing and laying of the pipe and the San Francisco Bridge Company's bid should be lower than Hoffman & Bates' bid for furnishing (record, p. 266) the plates, so that there might be a change [chance] to combine those two bids on both those two items.

"Q. State as nearly as you can, Mr. Bush, what was said by Mr. Hoffman and by Mr. McMullen as to the manner in which they would each bid—what should be done, giving all the particulars of it as nearly you can, what they said and if you cannot remember their language give it as nearly as you can.

"A. Well, there was a great many conversations in my presence, the general idea being that they would each bid.

"Q. Go on and state what it was.

"A. Each would bid on his own account, and they would share in whatever portions of the work they might be successful in getting; as I before stated, Hoffman & Bates' bid should be lower for the manufacture and laying, and the San Francisco Bridge Company's bid should be lower on the delivery of the plates; that was

the day the bids should be opened; that combination they were making to get as much of the work as possible. (Record, p. 267.)

"Q. In what way?

"A. By combining Lee Hoffman's bid on the manufacture and laying with the San Francisco Bridge Company's bid on the delivery of the plates, or if there was no bid between that combination—the Hoffman & Bates' bid on the manufacture and laying, and the San Francisco Bridge Company's bid on the delivery of the plates—that the San Francisco Bridge Company *was to try to withdraw their bid on the delivery of the plates, so that the whole work should go to Hoffman & Bates.* (Record, p. 268.)

"Q. We will put it in another way; was there any agreement or understanding between Mr. McMullen and Mr. Hoffman as to what McMullen should do, or the San Francisco Bridge Company should do, in case their bid for the steel plates was the next lowest to the bid of Hoffman & Bates—as to the San Francisco Bridge Company withdrawing from the bid, or trying to withdraw from the bid and let the work go to Hoffman & Bates?

"A. Well, there was some talk of either one of them withdrawing, if by doing so they could combine the bids to better advantage or get more work.

"Q. Well, you may state as nearly as you can, Mr. Bush, what agreement was had between them upon that subject.

"A. *The agreement was about a combination of the bids on the two items of manufacturing and laying and the delivery of the plates*; that those two items should be combined in the two bids in the best way that they could to get the most money out of the job; that in case the San Francisco Bridge Company's bid for the plates combined with the Hoffman & Bates' bid for the manufacture and laying made the lowest total, then the bid should be combined, and in case there was no bid between those two bids—between that total I have just spoken of—the total of the Hoffman & Bates bid on the manufacture and laying and the San Francisco Bridge Company on the delivery of the plates, then the San Francisco Bridge Company should withdraw their bids for the plates.

"Q. That could not only be ascertained when the bids were opened?

"A. Yes, sir. (Record, p. 270.)

"Q. Then, if I understand you, if it was ascertained upon opening the bids that the bid of Hoffman & Bates should prove to be the lowest bid for the manufacture and laying of the pipe, and the bid of McMullen, or the San Francisco Bridge Company, should prove to be the lowest for furnishing the plates, and that those two to-

gether would make the lowest total, it was agreed that the San Francisco Bridge Company SHOULD ENDEAVOR, IF THEY COULD, TO GET RELIEVED FROM THEIR BID, and let Hoffman & Bates take it on their bids for the plates?

"A. If there was no bid between?

"Q. Yes, if there was no bid between, but as a matter of fact there was a bid between.

"A. Yes, and there was a bid lower than the total of those two bids." (Record, p. 271.)

On cross-examination this witness testifies:

"Q. I did not quite understand what you said about this combination bidding between McMullen and Hoffman, or the San Francisco Bridge Company and Hoffman. How was it that they were going to combine their bids—on a general average?

"A. The Hoffman and Bates bid on manufacturing and laying was \$465,667.00, and the San Francisco Bridge Company's bid on the plates was \$348,781.00, making a total for the two of \$814,448.00. NOW, IT WAS UNDERSTOOD IF THAT WAS THE LOWEST (record, p. 275) TOTAL THAT THEN THEY WERE TO MAKE AN EFFORT TO HAVE HOFFMAN AND BATES' BID ON THE DELIVERY OF THE PLATES ACCEPTED, AND HAVE THE SAN FRANCISCO BRIDGE COMPANY'S BID ON THE DELIVERY OF THE PLATES WITHDRAWN, which would

raise the total they were to receive on the delivery of the plates about \$10,000. The exact total would be \$824,945.80." (Record, p. 276.)

It is true that P. L. Willis, Hoffman's attorney, gives some testimony as to declarations which Hoffman had made to him on these points, but if these declarations are in any sense competent evidence they add nothing to Bush's statements.

We ask where is there any suggestion of fraud in this proposal? It signifies only that the parties, so far from intending to defraud the city of Portland, simply proposed to represent that the aggregate of their two bids was lower than any other aggregate upon these branches of the work, and that consequently both contracts should be awarded them. It was a proposition directly in the interest of the city, however prejudicial it might have been to other bidders, and it was to be presented openly to the city in this light. It would be hard to conceive of a more strained effort to torture a fair transaction into a fraudulent one. If any such thing was contemplated without the city's approval, it would simply have been, as McMullen characterizes it, "idiotic."

And even if this project were capable of the coloring which counsel for respondent seek to give it, how can a scheme which never materialized, never came into existence, never had any application to the matters in suit, affect McMullen's right of recovery? The parties did not suc-

ceed on the other bid and consequently could not make any such combination.

McMullen testifies in regard to this matter in response to the examination of respondent's counsel (record, pp. 220-1):

"Q. Now, was it not agreed and understood between yourself and Mr. Hoffman that if when these bids should be opened, Hoffman & Bates should get the contract for manufacturing and laying the pipe, and the bid of the San Francisco Bridge Company should be the next lowest on the other items, and the bid of Hoffman & Bates should be the next lowest to them, or above them—that in that case, the San Francisco Bridge Company would refuse to accept the award to them, if it were made to them, and all effort should be made that could be made *to induce the water committee to take the contract at the rate named in the bid of Hoffman & Bates?*

"A. That is absolutely untrue; it is more than that, it is idiotic; these bids were accompanied by a check, I think, to the amount of \$25,000, to carry out the contract, and we would have to sacrifice that check to get the price of about—according to the items in the question—\$14,000.

"Q. I simply ask the fact whether there was not such arrangement as that?

"A. No, sir, there was no such arrangement ; I don't think that anybody ever told you that there was ever any such arrangement.

"Q. I don't think, Mr. McMullen, that there is any question of veracity between you and I ; I am not arguing the question.

"A. There was no such arrangement."

With regard to the argument which has been made as to the defense based upon the bidding for the work involved in the pending controversy, we may say that the strongest presentation of the case which can be claimed by the respondent is that the action of the parties will preclude a recovery by McMullen upon either of the following hypotheses, viz :

1. If it was the purpose of Hoffman and McMullen to deceive the city of Portland to its detriment.
2. If that was the natural tendency of their action.
3. If that was the result of their action.

With regard to the first proposition, it is to be observed that there is no charge in the bill, nor is there a particle of evidence in the record, that Hoffman and McMullen ever conspired to mislead the water committee of the city of Portland in the matter of their bids for the work in suit.

We are aware that the court may infer an intention from the character of an act, a consideration which in this connection more appropriately falls under the second proposition stated above, but beyond this the record is absolutely as we state it. Bush testifies that Hoffman and McMullen did agree that each of them should bid in different amounts, *but that this was for the purpose of enabling them to effect the combinations discussed above.* He does not offer a suggestion that they ever had under consideration at any time or in any connection the matter of deceiving the water committee in regard to their bids on the manufacturing and laying of the steel pipe. It is argued that the tendency of McMullen's act in having submitted a higher bid than Hoffman for the same work was to lead the water committee to conclude that Hoffman's bid was a desirable one. This claim will be answered a little further along. We say now only that respondent's counsel cannot point out a word of evidence going to show that Hoffman and McMullen ever discussed any such result, or that it ever entered the head of either of them.

We beg to submit the testimony bearing upon this matter.

We do not wish the court to understand that we impugn Mr. Bush's veracity, but we do say that his testimony ought to be taken as the strongest presentation of respondent's case which can be made. He was an employee of Hoffman's,

and in this controversy he voluntarily crossed the continent from his Massachusetts home (record, p. 275) to give his testimony on that side of the case. He is at least a very friendly witness.

Before reciting this testimony we desire to attract the court's attention to a point which has led to a great deal of confusion in the case, and that is the difference between a "bid" and an "estimate." It has been contended by respondent's counsel that McMullen came to Portland with the intention of bidding against Hoffman on the work in suit, and very much has been said about certain *figures* which McMullen brought with him. It is perfectly clear that these figures represented the engineers' estimates of the cost of doing the work, and were in no sense of the word a proposed bid, which of course included these cost estimates plus such sum as the contractor might see fit to add for prospective profit. We shall rely upon the showing already made that Hoffman and McMullen never contemplated opposing each other, or bidding otherwise than in their joint interest, and not go into that feature of the case again.

Bush gives the following testimony :

"Q. What, if anything, had you to do while you were in the employ of Mr. Hoffman in making estimates or bids for bringing Bull Run water to Portland ?

"A. Mr. Hoffman went to San Francisco some two weeks before the time of opening bids; he instructed me before he went away to make an estimate of the cost of manufacturing and laying pipe so as to be able to prepare a bid on his return. (Record, p. 263.)

"Q. What occurred on his return, if anything, in relation to preparing bids on this work for the manufacturing and laying of the pipe, plates, etc.?

"A. Well, *Mr. McMullen came up with him*, and Mr. Hoffman informed me that he and Mr. McMullen were going to bid together for the work; MR. McMULLEN HAD A GREAT MANY ESTIMATES AND FIGURES AND LETTERS REFERRING TO THE COST OF THE WORK, and I went all through those." (Record, p. 264.)

On cross-examination the witness testified:

"Q. You were representing Mr. Hoffman and assisting him in making estimates, were you not?

"A. Yes, sir.

"Q. Did you not make a great many estimates, or I will say several estimates during those days? (Record, p. 277.)

"A. Well, I made several estimates; yes, sir.

"Q. *And is it not a fact that you were making these several estimates because they had not agreed*

upon any bid when McMullen first arrived here—neither one of them?

"A. Yes, I think it was a fact that they had not agreed upon a bid.

"Q. And these different estimates which you were making were in consequence of their want of agreement in regard to the amount of the bid to enable them to finally arrive at a bid which would be satisfactory, and would be submitted to the water committee?

"A. Yes, sir. (Record, p. 278.)

"Q. Now, I notice the first item to which you refer on the Catt estimate is \$282,768.00, and on your estimate it is \$324,000.00—that is, for manufacturing and laying of the pipe; how did you arrive at that change in figures—just made a guess, or by careful consideration of all elements which would enter into the cost of furnishing the material and doing the work?

"A. No, sir; we decided in the beginning THAT AS THREE ESTIMATES OF THE COST CORRESPONDED SO CLOSELY, THAT THAT SUM SETTLED THE QUESTION OF COST. After that it was simply a question of how much profit to add.

"Q. What estimates do you refer to? (Record, p. 283.)

"A. THE ESTIMATES MR. McMULLEN BROUGHT FROM SAN FRANCISCO BY MR. WOOD, AND MR. CATT'S ESTIMATE, AND MINE. (Record, p. 284.)

"Q. I have a note here which is not quite clear what you (record, p. 287) said about Hoffman trying to get the bid increased; what bid was that, do you remember?

"A. I think that related to manufacturing and laying.

"Q. Whose bid, Hoffman's or McMullen's?

"A. Well, I think I referred to that when they were talking about Catt's estimate. My original bid was almost the same as his, within a few thousand dollars.

"Q. YOU MEAN ESTIMATE?

"A. YES, SIR, ESTIMATE." (Record, p. 288.)

On his further examination for respondent Bush testified:

"Q. In his testimony Mr. Mullen stated that when he came up from San Francisco he brought all the data he had relating to this pipe line business, and took it to Mr. Hoffman's office, and that Mr. Hoffman brought all that he had, and Mr. McMullen and Mr. Hoffman and Mr. Hoffman's engineer and Mr. Lockwood and Mr. Cooper set down together and discussed the matter, and out of the most of the data that they had, and the information they were getting constantly from the east, they finally formulated a bid that was put in; what was the fact about that?

"A. The fact is that when Mr. McMullen first came up here we compared all our estimates of the cost—

"Q. When you speak of "we," who do you mean?

"A. I mean Mr. Hoffman, Mr. McMullen and myself; and Mr. Lockwood was there some of the time, I think not at the first, and we finally settled on the fact *that the estimates of the cost must be correct.*

"Q. That is the cost of manufacturing and laying the pipe—what led you to that conclusion?

"A. Well, because the three estimates were practically the same; after that it became a question simply of deciding how much profit to put on the job, *and that subject was talked over back and forth principally between Mr. Hoffman and Mr. McMullen themselves.*" (Record, p. 329.)

On cross-examination he testified.

"Q. You say that you prepared [compared] all the estimates of cost which Mr. McMullen brought here, [with] what you had made, and from that you determined that the three estimates, being approximately the same, must be nearly correct?

"A. Yes, sir.

"Q. IS IT NOT A FACT THAT THAT IS THE ONLY USE THAT WAS MADE OF THOSE ESTIMATES TO DETERMINE THE COST PRICE?

"A. WELL, I DON'T KNOW BUT WHAT IT WAS.
(Record, p. 330.)

"Q. THE CALCULATION OF THE ENGINEERS HAD NOTHING TO DO WITH THE DETERMINATION OF McMULLEN AND HOFFMAN AS TO WHAT AMOUNT THEY WOULD ADD TO THE ENGINEERS' ESTIMATE FOR PROFIT, HAD IT ?

"A. NO, SIR.

"Q. McMULLEN AND HOFFMAN DETERMINED THAT THEMSELVES, IRRESPECTIVE OF ANYTHING THE ENGINEERS DID ?

"A. YES, SIR." (Record, p. 331.)

In this connection Wood, McMullen's San Francisco engineer, gives the following testimony in his deposition :

"Interrogatory 4. If you answer the last interrogatory in the affirmative, I will ask you to state what, if anything, you had to do in connection with said letting and on whose behalf or at whose instance, you performed whatever service you may have performed? State fully just what you did.

"Answer 4. On behalf and at the instance of John McMullen, president of the San Francisco Bridge Co., and Lee Hoffman, I made several estimates and inquiries concerning the cost of the different items on the Bull Run waterworks contract pri-

or to the letting of said contract as above mentioned.

* * * No bid made by me at any time was intended to be final for the use of said John McMullen and Lee Hoffman, as it was definitely understood that a similar preliminary estimate was to be independently made by George W. Catt, of New York, which was to contain the experience of Clemens Herschel, chief engineer of the Jersey City pipe line; and also a third estimate was to be independently made by the engineer of Hoffman and Bates, of Portland, Oregon. (Record, p. 146.) * * *

I was informed before making this Exhibit U2 and V2 that the items of the three estimates, including this, were to be reviewed by our Seattle engineer, Mr. J. B. C. Lockwood, and by the engineer of Hoffman and Bates in Portland, and by the principals, John McMullen and Lee Hoffman, and each individual item checked one with the other, and that which seemed most reliable in the light of such comparison to be used in the final estimate and bid, and I understood, and still understand, that these comparisons were so made, and that such final estimate there resulted. (Record, p. 147.)

“Interrogatory 6. If you answer the last interrogatory in the affirmative, I will ask you to state what the purpose of this computation was, that is to say, whether it was designed for a bid on any portion of the work, or as an estimate of the cost price of doing the work.

"Answer 6. It was in no sense designed as a bid on the work, but, as explained, for the purpose of drawing checks to be used in the bid. It was an estimate of the cost price of doing the work in my opinion, subject to being checked by two other estimates, as explained.

"Interrogatory 8. In connection with the matters covered by the preceding interrogatory, I will ask you to state whether or not any bid for this portion of the work was prepared or agreed upon in form to be submitted by the San Francisco Bridge Company or McMullen prior to the visit of the latter to Portland, shortly before the letting took place.

"Answer 8. No bid was prepared or agreed upon to be submitted at the letting, or for any other purpose than for preliminary comparison and the drawing of proper certified checks, as above explained." (Record, p. 148.)

Catt testifies in his deposition:

"Interrogatory 7. Please state what you did, or were required to do by the San Francisco Bridge company or by Mr. McMullen, in connection with this work referred to, and what any reports rendered by you to the San Francisco Bridge Company or to McMullen were designed to cover, and what office they were designed to perform.

"To the seventh interrogatory he saith: The estimate headed 'Portland Water Works Esti-

mate' was designed to cover the items named therein, and was my report of the estimated cost of the work, based on the information I then had, and was subject to correction in future reports; and it was thus corrected. The report, of which this is a partial and somewhat incorrect extract, was made February 21st, 1893, and was the first general report made. There were some ten or twelve reports made after it. They were, all of them intended to aid McMullen and Hoffman in making up a bid for the 'Bull Run' pipe line works, and embodied my estimate of the cost. It was not intended as a bid, the letter which accompanied it called it an estimate. The several parts of it were called 'bids' because that was the designation given them in the specifications. They were, however, in no sense bids or tenders for the work, nor were they intended as such. Throughout my reports such expressions as these frequently occurred:

"'My estimate item No. is only approximate, you best check this carefully;' or, 'This is my estimate, you may think differently.'

"The actual amount of this bid to be put in was to be determined at Portland, Oregon, by the representatives of the two concerns. My estimates were to aid these representatives in arriving at a proper and safe bid to make for the work." (Record, p. 156.)

It is as plain as anything could be made from this testimony that McMullen did not come to

Portland with a bid, or with anything beyond what is technically known as an "estimate of cost."

The testimony of Bush heretofore recited (*supra*, pp. 57-8) and of Wakefield (pp. 60-1) conclusively shows that it was McMullen who finally fixed the Hoffman bid, and completely negatives the idea that he was taking any interest in any other bid.

Bush gives this further testimony in regard to McMullen's bid on the work in suit (record, p. 300):

"Q. If Mr. Lockwood did any figuring on this matter at all, to what part of the work was his figuring directed?

"A. I do not think Mr. Lockwood did any figuring to amount to anything. He simply filled out Mr. McMullen's bid.

"Q. Now where was he when he filled out that bid?

"A. In Mr. Hoffman's office.

"Q. How were the figures on that bid arranged and by whom?

"A. WELL, THE FIGURES IN MR. McMULLEN'S BID FOR MANUFACTURING AND LAYING WERE NOT PARTICULARLY AGREED UPON BY ANYBODY. IT WAS AGREED THAT IT SHOULD BE A HIGH BID, AND IT WAS SIMPLY FILLED IN TO MAKE IT HIGH. IT

WAS NOT AGREED UPON TO BE ANY PARTICULAR AMOUNT."

It is certainly a most extraordinary thing if Hoffman and McMullen were scheming and conspiring to deceive the water committee by means of McMullen's bid, that they should have been so indifferent to its amount!

Now in regard to his bid on the work in suit we submit that McMullen offers a perfectly rational explanation of his action, and there is not a syllable in the record to the contrary. He testifies as follows on cross examination:

"Q. Did you prepare any bid for this work, or substantially the same work, to be submitted to that commission?

"A. No, I did not.

"Q. Did you do any preliminary figuring with reference to the bid upon that same work before you consulted with Mr. Hoffman?

"A. Oh, yes. (Record, p. 176.)

"Q. Did you not, as a matter fact, Mr. McMullen, come prepared, or prepared while you were here, a set of figures to be bid for substantially the same work, which was a number of dollars less than the amount of the bid agreed upon between yourself and Mr. Hoffman to be bid?

"A. I never did.

"Q. Did you ever have any such a bid as that that you exhibited to Mr. Hoffman?

"A. Well, now, judge, I think you are falling into an error in confounding a bid with an estimate.

"Mr. COX.—Don't be argumentative; simply answer the questions.

"The WITNESS.—Repeat the question.

"(The question is read to the witness.)

"A. In the first part of the question it is a set of figures, in the second question it is a bid. Now, I cannot answer the question intelligently under the circumstances. There is a great deal of difference between a set of figures and a bid. If you mean a bid, then I will answer you; if you mean a set of figures, it is something different.

"Q. I will ask you for a set figures intended for a bid.

"A. No, sir; never did; never had any set of figures that were in any way intended for a bid except the set of figures that was put in by Mr. Hoffman, under the name of Hoffman & Bates, in which I had an interest.

"Q. The set of figures or bid which I have referred to were they not exhibited to Mr. Hoffman, and did you not indicate or say to Mr. Hoffman that you intended to file them with the committee as a bid, and did he not object unless the

amount was raised above the statement as he had prepared it?

"A. I never did, and he never did; we conferred together about the amount that we should bid, and when we arrived at a conclusion the bid was put in, and that was the only time that our joint judgment agreed as to what the value of this work was.

"Q. Do you swear, Mr. McMullen, that you did not come here with a set of figures intending to bid upon this work, or if not did you not prepare a set of figures while here, intending to bid upon this work—which you exhibited to Mr. Hoffman, and that Mr. Hoffman objected to your making a bid without increasing the amount charged for this work? (Record, p. 177.)

"A. I did not.

"Q. You swear that you did not?

"A. I swear that I did not. (Record, p. 178.)

"Q. Did not Mr. Hoffman have an estimate prepared by himself as a basis for a bid for the work of which we are speaking, which you required to be reduced, assuring Mr. Hoffman that the work could not be done at those figures, and was not Mr. Hoffman's bid reduced at your suggestion?

"A. No, his bid was not reduced; he never made but one bid.

"Q. His estimate, then?

"A. Well, the facts are these: That after I got to Portland, I think, judge, I can help you along in this, if you want it the way I understand it.

"Q. Answer my question; if I don't get it right, you can correct me, but I want to get it just as it is.

"A. The facts are these, that there was no definite, final estimate arrived at except the one that was put in the bid, but the other estimates were made jointly, and when I came to Portland, I brought all the data and information that I had gathered, and went into Mr. Hoffman's office, and laid them down on his table, and he at the same time, and in the same place, produced all the data and information that he had gathered, and he had his engineer there, and Mr. Lockwood, an engineer of the San Francisco Bridge Co., and Mr. Hugh L. Cooper, another engineer in the employ of the San Francisco Bridge Co., were all together in the same room, and we had all these papers, and we took the different items in the cost up seriatim, and we argued them whether they were high or whether they were low, and every day we were getting telegrams all [and] letters that caused us to modify, sometimes to increase and sometimes to diminish, our idea of the cost of each separate part of this work; generally, I would state, that I was low, that is, I insisted that if we were going to bid at all for (record, p. 179) this work, we must put in a bold, hard bid; Mr. Hoffman was

somewhat inclined to be conservative and the result of our joint judgment as to the lowest price that we should put in was agreed upon about 11 o'clock that night in Mr. Hoffman's office, in the presence of his engineer and our two engineers; on the next day it was written out by Mr. Hoffman's engineer on a blank form, and the bid put in by him. Now, that is substantially the way the bid was evolved. (Record, p. 180.)

"Q. When you and Mr. Hoffman were figuring upon the bid that you finally put in to the water committee, you also figured upon the bid that you were to submit in the name of the San Francisco Bridge Company, did you not?

"A. We did not.

"Q. Did not?

"A. No.

"Q. You had no figuring with him or understanding with him about the bid that the San Francisco Bridge Company was to put in, did you?

"A. I did not, none at all; the only bid that we agreed to was the bid that went in in Mr. Hoffman's name.

"Q. He did not know that you were going to put a bid in for the San Francisco Bridge Company, did he?

"A. Oh, yes.

"Q. How did he find that out?

"A. Well, I think I told him so; I told him that I did not want to come up here and go home again without putting in a bid, and, for appearance sake, I wanted to put in a bid.

"Q. Did you show him the bid?

"A. I don't think so.

"Q. Do you swear that you did not?

"A. Yes, I swear that I did not.

"Q. You swear that you did not?

"A. Yes.

"Q. Mr. McMullen, is it not a fact that you arranged that bid with Mr. Hoffman purposely, so that it should overbid the amount of the other bid that you and he had?

"A. The fact is—

"Q. Just answer that question.

"A. No, sir.

"Mr. COX.—You can now make what explanation you want to. (Record, p. 218.)

"The WITNESS.—The explanation is this: There was only one bid agreed upon between Mr. Hoffman and myself, and that was the bid in which we both were interested in, and which was put in in the name of Hoffman & Bates; the other bid referred to by Mr. Mallory is the bid put in by the San Francisco Bridge Company, some forty or fifty thousand dollars higher than the bid that we proposed to take the job on, and was put in simply to keep the San Francisco

Bridge Company's name before the public, and for the further purpose that all the contractors knew that the San Francisco Bridge Company was here, and would think it strange if we did not put in a bid. Mr. Hoffman did not care anything about the bid, nor did the San Francisco Bridge Company care anything about it, but it was put in as a pure matter of form. We knew it would be too high, and that is absolutely the truth about that bid as I know it to be.

"Q. Is it not a fact that you and Mr. Hoffman agreed together to make the aggregate of the bid of the San Francisco Bridge Company more than the aggregate of the bid of Hoffman & Bates?

"A. No, sir, Mr. Hoffman had nothing to do with the San Francisco Bridge Company's bid, and it was put in by the San Francisco Bridge Company for the purpose as I have stated, and Mr. Hoffman cared, or knew, or had nothing to say, about it. (Record, p. 219.)

"Q. Was not the understanding between you and Mr. Hoffman, that while your bid for manufacturing and laying pipe was \$514,664.00 and the bid of Hoffman & Bates was \$456,656.00, you made the bid of the San Francisco Bridge Company on all of the other work less than the amount named in the bid of Hoffman & Bates?

"A. The low bid of either Hoffman or the San Francisco Bridge Company was the joint bid

in all cases, and other bids that may have been put in by either party, as I said before, we had no interest in; it was simply put in to let other people know that both parties were represented here, as the water committee and the engineers and contractors all knew that both parties were represented here. The higher bid was simply put in to let the name of that firm appear as a bidder, and we had no interest in it, and we did not care anything about how much it was, and by 'we' I mean Mr. Hoffman and myself. The high bid was put in simply to allow the firm putting it in to be represented at the bidding." (Record, p. 220.)

It remains to notice the charge against McMullen of a purpose to influence the clerk of the water committee as shown in a certain letter written by him to Hoffman, which charge is very artfully presented in the answer so as to appear to embody a force which it does not at all possess. This seems to have constituted the principal reliance of counsel for respondent, and the circuit court of appeals made it the test by which they judged of McMullen's right to recover. It has no legitimate influence upon the true issues between the parties and its sole office is to involve the case in a bad atmosphere and thereby obscure the real points before the court. We do not feel called upon to say more of this matter than this:—

1. The letter was written August 4, 1893, *just five months after the transactions involved in*

this suit had been concluded, and it did not enter in any degree into the joint action of Hoffman and McMullen, or have anything whatever to do with their action. (See record, p. 556.)

2. It was in regard to a distinct and separate branch of the water works system. The answer does not charge that both parties were trying to get this contract, but simply that *McMullen* was trying to get it.

3. The charge in the answer, upon the strength of which the letter was introduced before the examiner, was stricken out by the trial court, as has been shown.

4. The letter was objected to by McMullen's counsel when offered in evidence. (Record, p. 204.)

We think the testimony recited above completely establishes the first of our propositions, viz.: That it was not the intention of Hoffman and McMullen to endeavor to deceive the water committee in the matter of their bids.

Therefore the respondent has failed to make out any case of fraud in fact against McMullen and has failed to substantiate even the loose and ambiguous charges of the answer, and the only question before the court is as to whether the acts pleaded in defense are constructively fraudulent, or may be deemed sufficient to raise a presumption of fraud.

The action of McMullen in submitting a high bid for the work in suit had no rational tendency to deceive the water committee.

Before reviewing the evidence bearing upon this feature of the case, it may not be out of place to make some reference to the authorities which enunciate the principle by which the act is to be judged.

The primary question involved is of course that of public policy. Of this Best, C. J. said in *Richardson vs. Mellish*, 2 Bing., 229, on page 242:

"We have heard much of this being a contravention of public policy, and that, on that ground, it cannot be supported. I am not much disposed to yield to arguments of public policy: I think the courts of *Westminster Hall* (speaking with deference as an humble individual like myself ought to speak of the judgments of those who have gone before me) have gone much further than they were warranted in going in questions of policy: they have taken on themselves, sometimes, to decide doubtful questions of policy; and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say, it is not a doubtful matter of policy that will decide this, or that will pre-

vent the party from recovering :—if once you bring it to that, the plaintiff is entitled to recover.”

Burrough, J., said in the same case on page 252 :

“I am of opinion, that on the face of this count there is no illegality. If it be illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. I, for one, protest, as my Lord has done, against arguing too strongly upon *public policy* ;— *it is a very unruly horse*, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.”

We have stated the triple aspect of McMullen's action above quite as strongly as we think respondent's counsel would have stated it on her behalf, and, we think, more in her favor than the authorities justify.

In *Wicker vs. Hoppock*, 6 Wall., 94, the parties had agreed that if Hoppock would take a judgment against Chapin & Co. and expose their property for sale, Wicker would attend the sale and bid the amount of the judgment. Hoppock complied with his promise, but Wicker did not attend the sale nor bid. Hoppock sued for breach of contract and recovered, and Wicker brought the action up on writ of error. The judgment was affirmed, the court saying (p. 97) :

"It is said that the agreement between the parties 'was invalid because calculated to interfere with, and prevent the fairness and freedom of a judicial sale; and prevent competition, and therefore against public policy.'

"The contract was, that the defendant in error should procure judgments against Chapin & Co. for the rent in arrear, levy upon the machinery and fixtures in the distillery, and expose them for sale, and that the plaintiff in error should bid for them the amount of the judgments.

"The validity of such an arrangement depends upon the intention by which the parties are animated, and the object sought to be accomplished. If the object be fair—if there is no indirection—no purpose to prevent the competition of bidders, and such is not the necessary effect of the arrangement in a way contrary to public policy, the agreement is unobjectionable and will be sustained."

The only case which we have been able to discover which involves facts similar to those found here is *People vs. Stephens*, 71 N. Y., 527, and while there are some additional considerations in that case, what is recited below is certainly to the point in the pending controversy. Public work was let to bids, and a number of sham bids, higher than the one on which the contract was awarded, were submitted. The court say (p. 547):

"The contract was also assailed as fraudulent by reason of the acts of the parties in submitting, or causing to be submitted, to the contracting board sham and false proposals holding them out as genuine. In this particular instance, the simulated offers were at higher prices than those named in the proposal of Leahy, and the latter was in fact the lowest bidder. *Whether the other bids affected the judgment of the contracting board, and influenced its decision in accepting the proposal, on the ground that it was not excessive in price or disadvantageous to the state, there is no evidence.*" (Italics ours.)

And again (p. 548): "Evidence was given on the trial tending to show that the contract price was excessive; but there was no evidence that the contracting board acted corruptly or *mala fide*, or that they had not full knowledge of every fact bearing upon the question, as well as of the character and value of the services to be performed, and the risks to be encountered by the contractor."

In reality this method of letting contracts is but a species of auction sale of a reverse order, in which attempts to mislead in regard to the question of values are quite analogous to the efforts of "puffers" employed by vendors. In these cases actual deception is made the test of avoidance.

Thus in *Veazie vs. Williams*, 8 How., 134, where an auction sale of property was held and

real bidders ran the property up to \$20,000, and thereupon the auctioneer by fictitious bids ran it up to \$40,000, at which figure it was taken by a purchaser who afterwards sought a release from his purchase on the ground of fraud, this court said (p. 157) the test to be applied was, "Was the purchaser deceived?"

This case was heard before Mr. Justice Story on the circuit, and in reviewing the authorities bearing on the question he says (3 Story, 611, 620-2):

"On the other hand, Lord Loughborough, in *Conolly vs. Parsons* (3 Ves. Jr. 625, note), held the opposite doctrine; at least, as applicable to cases where there was no absolute, intentional fraud. He said; 'I feel vast difficulty to compass the reasoning, that a person does not follow his own judgment, because other persons bid; that the judgment of one person is deluded and influenced by the bidding of others. It may weigh, if A. a skillful man, B. a cautious man, and C. a wealthy man, are in competition. But where it is publicly known, that persons are so employed to bid, it would be very foolish in anyone to let himself be so influenced.' He afterwards added; 'It is not doubted at any sale, except where there is an express stipulation to sell without reserve, that there is somebody for the seller. The buyer goes to the sale with this knowledge, that he shall not get the article under a price the seller thinks to

be a reasonable price.' Lord Alvanley, in *Bramley vs. Alt*, (3 Ves. Jr. 620), seems to have acted upon the same doctrine, where, although bidders are employed by the seller, yet there is a real bidder immediately before the purchaser.

"It appears to me, that there is room for some distinctions upon this subject, which, if they do not fully reconcile the cases, are, at all events, well adapted to subserve the purposes of private justice and convenience, as well as public policy. Where all the bidders at the sale, except the purchaser, are secretly employed by the seller, and yet are apparently real bidders, and the purchaser is misled thereby, and is induced to give a larger price in consequence of their supposed honesty and exercise of judgment, there the sale ought to be held a fraud upon the purchaser, because he has been intentionally deluded by them. But where there are real bidders, as well as secret bidders for the sellers, there, if the last bid before the purchaser's bid be a real bid, and no intentional deceit has been practiced by what have been sometimes called decoy ducks, to mislead or surprise the judgment or discretion either of other real bidders or of the purchaser, there seems to be a solid ground to hold that the sale is valid, and for the very reason stated by Lord Loughborough and Lord Alvanley."

The principle laid down in this last case was applied by Chancellor Zabriskie in *National Bank of the Metropolis vs. Sprague*, 20 N. J. Eq., 159.

In this case the bids ranged as follows (record, p. 242):

Risdon Iron & Locomotive Works, \$600,737.

Bullen Bridge Company, \$533,507.

Oscar Huber, \$521,775.40.

San Francisco Bridge Company, \$514,664.

Wolff, Buehner & Zwicker, \$495,682.

Perry Hinkle and Robert Wakefield, \$481,040.

E. W. Jones and O. W. Wagner, \$477,552.

Hoffman & Bates, \$465,667.

Just in this connection we give the testimony of Col. Isaac W. Smith, the engineer of the water committee. He says (record, p. 242):

"Q. These bids were all before the committee and taken under consideration at the time the award to Hoffman & Bates was made, were they not?

"A. They were all opened on the same day at the same time.

"Q. And all given consideration?

"A. All given consideration, yes.

"Q. How did the estimate which you had made on the work of manufacturing and laying the steel pipe compare with the bid put in by the San Francisco Bridge Co. for that work?

"A. I think that my estimate was larger than the estimate of the San Francisco Bridge Co. I estimated a larger price for the iron.

"Q. Your aggregate estimate was larger than the bid which the San Francisco Bridge Company put in?

"A. Yes, sir."

Now, in cases where it is held that by-bidding may be ground of relieving a purchaser from an exorbitant bid, this relief is based on considerations of public policy, for while the purchaser may be the immediate victim of the fraud it is in the interest of the public that such practices be stopped. Therefore, if in an ordinary auction sale where the purchaser runs the hazard of being defrauded, he must show that his bid rested on a fictitious one, and that he relied upon and was misled by the fictitious bid, why is not the converse of the proposition true in what are denominated "Dutch auctions" where the vendor runs the risk of deception?

Apart from these decisions we ask, could the action of McMullen in submitting his higher bid have had any *rational* tendency to mislead the water committee? It seems to us clearly that this is the test to be applied, and not whether it had a speculative or imaginary tendency.

Col Smith testifies (record, pp. 241-2) :

"Q. Is it not a fact, Colonel, that before these bids were opened or considered that you had made full estimates in regard to all of the work for

which bids were submitted, so as to determine the reasonable cost of doing the same ?

"A. I did make that estimate.

"Q. It is a fact, is it not, that this estimate had been submitted to the committee, and was before the committee at the time these bids were opened ?

"A. My estimates had been submitted to the committee; I do not know whether they were before the committee at that time.

"Q. How long prior to this time had they been submitted ?

"A. Well, I suppose my last estimate was probably about three months before the letting of the bids.

"Q. Did you not advise the committee from time to time as its engineer in regard to the cost of doing this work, prior to the time these bids were opened and the contracts let ?

"A. How do you mean, during the progress of the work or prior ?

"Q. Prior to the time the bids were opened.

"A. Yes; I made a great many estimates from 1886 to 1893, and while the work was going on I made a great many estimates for them; I do not remember the dates. I estimated the cost and made a full report.

"Q. That had all been submitted to the committee before the bids were opened.

"A. It had all been submitted to the committee before the bids were opened.

"Q. Did not the committee in the matter of those bids reserve the right to reject any and all bids?

"A. They did.

"Q. And without the necessity of assigning any reason therefor?

"A. That is the fact; they reserved the right."

Now how can it be said when the water committee were acting under the advice of their own skilled expert, whose estimates were all before them, and whose estimate on the work in suit exceeded the amount of McMullen's bid, that they could reasonably have been misled by McMullen's bid? This will appear more clearly below in connection with our consideration of the question as to whether or not they were in fact misled. The language of Lord Loughborough quoted above applies with great force to such a condition, wherein he says: "I feel vast difficulty to compass the reasoning, that a person does not follow his own judgment, because other persons bid; that the judgment of one person is deluded and influenced by the action of others." When two parties are set in array against each other, when their interests are directly antagonistic, when each knows that any advantage gained by

one is at the expense of the other, we do not believe our courts will consider that either side is so guileless as to rely upon or be influenced by anything the other does.

‘We challenge the soundness of the “tendency” test. If actual fraud is found it should be given full force; if an actual result has been attained by designedly fraudulent means prejudicial to the other party, the victim of the fraud, in a proper case, should be relieved from the situation. But in a case where actual fraud is absent and no result has been accomplished, the mere tendency of an innocent act to mislead, or probability that it might mislead, is too visionary and speculative a consideration upon which to determine the substantive rights of individuals. Actual fraud is a certain ground for judicial action, and so is an actual result attained by fraudulent means; but to say that a mere *tendency* of an act to deceive, where nothing was designed and nothing accomplished, is to measure the rights of parties by a standard uncertain, fluctuating and altogether foreign to the principles upon which courts act.

The water committee of the City of Portland was in no degree influenced by McMullen’s bid, and did not take any different action in connection with it than would have been taken if it had never been submitted.

The testimony recited above has shown that the engineer made his own estimates upon the

work which exceeded the amount of McMullen's bid; that the water committee reserved the right to reject all bids; that eight bids in all were submitted, three higher and four lower than McMullen's.

Mr. Henry Failing, chairman of the water committee, was called by respondent to prove her case and he gave the following testimony:

"Q. Had you any knowledge or information at the time these bids were opened, or prior to that time, that Mr. Hoffman and Mr. McMullen were united in this purpose to bid on this work?

"A. No, sir.

"Q. Had no knowledge on that subject?

"A. I had not. I never saw Mr. McMullen to know him until today, although I think I have seen his face.

"Q. The testimony in this case shows that there was before the committee a bid of Hoffman and Bates for manufacturing and laying the pipe of some \$465,000.00, and something over that, and another bid submitted by the San Francisco Bridge Company for \$514,000.00 and some odd dollars, and so there was also evidence that there were some five or six other bids. I will ask you if at that time you had any knowledge that the

bid of the San Francisco Bridge Company, signed by McMullen was a mere sham simply put in for the sake of making a show?

"A. No, sir.

"Q. Now, was that bid with the others treated as being a bid in good faith? (Record, p. 387.)

"A. It was treated by the committee in the same way. *The bids were referred to the chief engineer for compilation.* They were all treated alike.

"Q. There was no knowledge on the part of yourself that there was anything about this bid any different from the other bids?

"A. No, sir." (Record, p. 388.)

On cross-examination the witness testified:

"Q. In the matter of taking these bids by the water committee, Mr. Failing, the committee was advised by its chief engineer, was it not, as to the probable cost of doing this work?

"A. Yes. We had got an estimate.

"Q. You had an engineer who you felt satisfied was competent to advise you in regard to the matter?

"A. Yes, sir.

"Q. The work of making these cost estimates was referred to him and he made them, did he not?

"A. Yes, sir.

"Q. What did the committee do in regard to these bids when they were submitted to the committee and opened?

"A. Referred them to the engineer.

"Q. Now, is not that all the action the committee took on the bids when they were first opened?

"A. *That is my recollection.* I think now that they authorized the contract to be entered into with the lowest bidder on the certificate of the engineer. I am not sure about that Mr. Cox; that was the usual method.

"Q. It is a fact, is it not, that the committee had reserved the right to reject any and all bids without assigning cause?

"A. Yes, sir. (Record, p. 393.)

"Q. Now, is it not a fact that the engineer took these bids when they were referred to him as you have testified, and that he went over the ground and reported to the committee the party who was the lowest bidder on each class of work for which proposals had been submitted, and the amount of his bid?

(Counsel for defendant objects to the answers as immaterial and not cross-examination, and objects to all the questions that have been propounded to the witness on that subject upon the same ground.)

"A. I think that is the fact. (Record, p. 395.)

"Q. Now, in making your annotation in regard to the schedule of bids you must have made it from something that satisfied your mind?

"A. Yes.

"Q. *And it needed no computation to determine whether the lowest bid was a good bid?*

"A. No.

"Q. *You looked to the advice of your engineer, did you not, to determine whether the lowest bid was a proper one?*

"A. *That is, a reasonable bid?*

"Q. *No, whether it was a good bid for the work according to the cost price of the work.*

"A. Yes.

"Q. And you simply took these figures down yourself to determine whether or not the engineer's report agreed with your own notation of what had taken place?

"A. Yes, sir.

"Q. You did not, Mr. Failing, for the purpose of determining whether the bid submitted in in the name of Hoffman and Bates was a reasonable bid as to the cost of doing this work, compare it with the bids of the San Francisco Bridge Company or with other bids, did you?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

"A. As to whether it was a reasonable cost or not?

"Q. Yes.

(Same objection.)

"A. I do not recollect just who the bidders were, but whoever they were they were taken down and I examined the gross sum of the work, and saw it and how it stood relatively, and which was the lowest.

"Q. You have not quite answered my question.

(The question beginning, 'You did not, Mr. Failing, for the purpose of determining, etc.,' was read to the witness by the examiner.)

"A. *I do not think I did.*

"Q. Now, I will ask you, Mr. Failing, if you were in any degree influenced as to the propriety of accepting the bid of (record, p. 396) Hoffman & Bates by the fact of the bid that was put in by the San Francisco Bridge Company, or in any other name, for the manufacturing and laying of this steel pipe?

(Objected to as incompetent, immaterial and irrelevant, and not cross-examination.)

"A. NO, I DO NOT THINK IT HAD THE SLIGHTEST INFLUENCE WITH ME. I did not know who the San Francisco Bridge Company were.

"Q. Then the fact is that you did not, so far as you were concerned, undertake to determine

on the merits anything about any of these bids when they were first submitted and opened by the water committee?

"A. No.

"Q. The bids were opened, listed and referred to the engineer?

"A. Yes.

"Q. And the engineer made up his report as to the lowest bidder, and upon the submission of the engineer's report the award was made?

(These questions are all objected to by counsel for defendant as immaterial, incompetent and irrelevant, and not cross-examination.)

"A. *I think that is correct.*

"Q. Do you remember now, Mr. Failing, what the bid of the San Francisco Bridge Company, or of any other bidder except Hoffman and Bates, was on the manufacturing and laying of steel pipe?

"A. No, sir.

"Q. Did it make any impression upon your mind whatever?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

"A. No, I cannot remember.

"Q. I wish you would state who were the members of the water committee on the first of March, 1893, if you can do so.

"A. I do not know whether I can repeat all their names, but I can a part of them.

"Q. Give as many as you can easily call to mind.

"A. Mr. C. H. Lewis, C. A. Dolph, J. Loewenberg, H. W. Corbett, R. B. Knapp, Mr. C. H. Hill—I think he was a member then—and C. H. Rafferty.

"Q. Mr. S. G. Reed was one, was he not?

"A. Yes, sir.

"Q. Now, I will ask you, Mr. Failing, if these gentlemen were not all gentlemen of large and varied business experience? (Record, p. 397.)

(Question objected to as immaterial and not cross-examination.)

"A. I think so—as a class they were.

"Q. You understood and they understood, so far as you know, did you not, from what transpired between them and yourself, that the committee was protecting itself on this matter of bidding, and was looking out for its interest, and expected the contractors to look out for their interests?

(Question objected to by counsel for defendant on the ground that it is immaterial, incompetent and irrelevant, and not cross-examination.)

"A. The committee was trying to protect the interests of the city in every respect.

"Q. And you expected the people who were submitting these bids to take care of themselves?

(Objected to as immaterial, incompetent and irrelevant, and not cross-examination.)

"A. Yes, sir." (Record, p. 398.).

McMullen's Exhibit 26 (record, pp. 500-1) shows the action of the water committee on the bids, as entered on its minutes:

"An adjourned meeting of the water committee was held at the office of Ladd & Tilton in Portland on Wednesday, March 1, 1893, at 3 P. M.

"Present: Chairman Failing, and Messrs. Corbett, Dekum, Dolph, Frank, Hill, Johnson, Lewis, Loewenberg, Rafferty and Richardson—11.

"On motion the reading of the minutes of the last meeting was dispensed with.

"On motion of Mr. Corbett the bidders were invited to enter the room; about 40 were present.

"The clerk presented a tin box and stated: 'That it contained 31 envelopes endorsed 'proposals,' all of which (except one which came by mail) had been presented by the bidders in person just before 12 o'clock noon this date, the limit of time fixed by the advertisement. As fast as the bids were handed in they were placed in the box and the latter sealed up at noon in the pres-

ence of the bidders. At 2:20 P. M. two additional envelopes endorsed 'proposals' were received with the understanding that as they were late the committee would decide whether they should be accepted.'

"On motion it was voted that these bids should be received.

"The box was then opened and all the proposals were read in detail by the chairman.

"On motion of Mr. Dolph, seconded by Mr. Corbett, the proposals were all referred to the engineer with instructions to prepare a tabulated statement of them and return all to the committee at 3 P. M. on March 2.

"Adjourned to meet at that time.

"[Signed.] HENRY FAILING, Chairman.

"Attest: Frank T. Dodge, Clerk.

"Pursuant to adjournment a meeting of the water committee was held at the office of Ladd & Tilton in Portland on Thursday, March 2, 1893, at 3 P. M.

"Present: Chairman Failing, and Messrs. Corbett, Dekum, Dolph, Frank, Hill, Johnson, Lewis, Loewenberg, Rafferty, Richardson and Smith—12.

"On motion the reading of the minutes of the last two meetings were dispensed with.

"The tabulated statement of all the proposals for the different works for the water supply from

Bull Run, which the committee at its last meeting directed the engineer to prepare, was presented and read. * * * * *

"Mr. Corbett moved, with the second of Mr. Dolph, that contracts be awarded to the following named parties, certified by the engineer as the lowest bidders:

"J. M. Leavens, Portland, Or., head works.....	\$	7,930.00
"Pacific Bridge Co., Portland, Or., bridges		30,000.00
"Risdon Iron & Locomotive Works, San Francisco, steel plates for conduit head works to Mt. Tabor.....		340,971.60
"Hoffman & Bates, Portland, Or., manufacture and laying ditto...		465,722.00
"Oregon Iron & Steel Co., Portland, Or., cast-iron conduit from Mt. Tabor to City Park.....		255,310.00
Total.....	\$	1,099,933.60"

There is no semblance of a suggestion that the water committee, or its engineer, were influenced by any bid cast with regard to their action, or that anything was done further than the mere ministerial act of making a computation, and the lowest bidder took the work under the prescribed conditions of the letting.

It goes without saying that McMullen's action in regard to the reduction of the Hoffman bid, which is made one of the grounds of defense, resulted in a direct benefit to the city of Portland. At his instance this bid was reduced \$13,500, and thereby the city saved \$11,885, for the next lowest bid, which would otherwise have taken the work, was that much higher than the Hoffman bid.

The partnership business of Hoffman and McMullen embraced work outside of the contract of the city of Portland with Hoffman, and also numerous transactions wholly independent of said contract, the profits of which were included in the decree of the circuit court in the case at bar.

The instrument signed by Hoffman and McMullen on March 6, 1893, which served as their articles of partnership, provided—after stating, in substance, that they had formed a partnership for the purpose of doing the work called for by the contract awarded by the water committee of the city of Portland to Hoffman & Bates, which was about to be formally entered into—as follows :

“It is further hereby agreed that if either of the parties hereto shall get a contract for doing, or do any other work let, or to be let, by said committee, for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be equally shared and borne by said parties.”

During the time when the work of manufacturing and laying steel pipe was in progress, under said contract made by the city of Portland with Hoffman, other work *outside of that contract*, in connection with bringing Bull Run water to Portland, was done by Hoffman and McMullen, under the direction of the chief engineer of the water committee. That work amounted in the aggregate, at the prices charged for it by Hoffman and McMullen (record, p. 119), to something over \$31,000, of which \$14,496.74 had been allowed by the city of Portland, and \$17,000 was in dispute, at the time McMullen's suit was commenced.

The profits made on the work done by Hoffman and McMullen, outside of the contract made by said city with Hoffman, do not appear from the stipulation contained in the record, but they are readily ascertainable, since all of the transactions respecting that work, are shown by the partnership books.

It also appears from the evidence in the case at bar, that while the work before mentioned was going on, Hoffman and McMullen kept a camp, store and boarding house, and maintained a hospital, and that from these and other miscellaneous sources, entirely outside of said contract for manufacturing and laying steel pipe, a profit was realized (record, p. 119) amounting to \$15,339.76. Besides this, as found in the decree of the circuit court (record, p. 110) the parties had accumulated miscellaneous property which had

cost \$7,857.36. All these matters were included in the decree of the trial court, and the decree of the circuit court of appeals took no note of them, but wiped the whole transaction out of existence.

Now, it is not alleged in the answer of Hoffman, nor has it ever been contended by counsel for the respondent, that there was anything unlawful or fraudulent, either in the work done by Hoffman and McMullen, outside of the contract made by the city of Portland with Hoffman, or in any of the transactions from which said profits amounting to \$15,339.76 were derived.

So that, if the illegality and fraud charged by Hoffman to have existed, in the agreement between McMullen and him to bid jointly, and in the means they employed to procure the award to Hoffman, of the contract for manufacturing and laying steel pipe, can be regarded as affording just grounds for depriving McMullen of his share of the profits realized in the partnership business carried on for the purpose of doing that work, those charges cannot furnish any reason whatever, for holding that McMullen is not entitled to recover his share of the profits made by the partnership, on work outside of that contract, and in transactions connected with the camp, store, boarding house and hospital before mentioned, all of which were entirely independent of the transactions arising out of the performance of the work called for by said contract made by the city of Portland with Hoffman & Bates.

With regard to the second defense urged by respondent, viz., that Hoffman dissolved the partnership between himself and McMullen on September 20, 1893, we submit that the ground upon which he professed to act gave him no right to effect any such dissolution and that none was accomplished in fact.

Hoffman's attempt at a dissolution of the co-partnership was of course an admission that one existed, that after the agreement to become partners had been entered into he and McMullen had launched the partnership and entered into the partnership relation. We will inquire first whether he had any ground for terminating this relation, and then, if any ground existed, whether the means to which he resorted were, or could have been effective.

It is charged in the answer as ground for this alleged dissolution (record, p. 35) :

1. That Hoffman was required to give a bond with sureties to the city of Portland for the performance of his contract in the sum of \$140,000; that he had requested McMullen to furnish part of the sureties, but McMullen had refused to furnish any of them, or to aid Hoffman in securing them.

2. That large advances of money were required in order to launch the work; that Hoffman was without the means of furnishing it; that from time to time up to September 16, 1893, he made

demands upon McMullen for half the requisite amount, but that McMullen "positively declined and refused to furnish any money whatever," claiming that he had none to put into business.

3. Generally, that after the parties had entered into the contract of March 6, McMullen "left the state of Oregon, and thereafter neglected, failed and refused to render any aid or to assist the defendant in any way whatever in carrying out said contract with the city of Portland."

4. In conclusion: "That by reason of said failure and refusal of said complainant to perform his part of the said alleged agreement of copartnership the said defendant, on or about the sixteenth of September, 1893, dissolved the same, and notified the complainant of such dissolution and the termination of said alleged agreement, and the said complainant thereafter assented to said dissolution, and that thereby the said supposed copartnership was dissolved and terminated."

We do not deem it necessary to produce at length McMullen's testimony found on pages 164, 170, 181, 193 of the record as to his assistance in the prosecution of the work after March 6, nor to do more than refer to McMullen's exhibits 22, 23, 24 and 25, and respondent's exhibits E2 to R2, inclusive, to show that the parties were operating together; but Bush, respondent's witness, called in part to show that McMullen did nothing, testifies:

"Q. Were you about the place and upon the work nearly all the time from the time that you began in June until the end of the work?

"A. Yes, sir, nearly all the time.

"Q. Do you know what Mr. McMullen did about the work?

"A. Well, he came out there two or three times to see us.

"Q. How many times do you think he was out there—do you remember of his being there?

"A. I remember not more than three times.

"Q. When was that, do you know?

"A. I think he was out there twice in 1893 and once in 1894.

"Q. About what time in 1894.

"A. He drove out there when we were working on the section line road; it was in June, I think.

"Q. Did he come alone?

"A. Yes, sir.

"Q. What did he do while he was there?

"A. He looked at the work.

"Q. How long did he stay?

"A. I think two or three hours." (Record, p. 273.)

On cross-examination Bush testified:

"Q. You say that after this contract was let you were about three months getting ready for the institution of active operations.

"A. Well, yes, sir. (Record, p. 288.)

"Q. Now, what was McMullen doing during that time in connection with the matter?

"A. I do not know; we had some correspondence with him.

"Q. Do not you know it to be a fact that Hoffman's office here was in constant correspondence with McMullen's office, calling upon him to render aid in San Francisco in connection with the same matters that you were engaged upon here?

"A. Yes, sir, he corresponded with him to some extent.

"Q. A very considerable extent, was it not?

"A. Well, I do not know, it might be called so.

"Q. *Is it not a fact Mr. McMullen, to a great extent, did exert himself in San Francisco to advise Mr. Hoffman in regard to these matters, and to look out for workmen and for implements, tools, and everything of that sort needed for the work?*

"A. *I think he did all he could, apparently.*

"Q. *Is it not a fact that he did all that you called upon him to do?*

"A. *Yes, I think so.*

"Q. Was it not the agreement, Mr. Bush, that Mr. Hoffman, being the local man on the work, was to have the immediate supervision of it?

"A. I understood it so.

"Q. From whom did you get that understanding?

"A. Well, I think from Hoffman.

"Q. And McMullen was not expected, was he, to come up here from San Francisco and take active control of the work, either jointly with Hoffman or singly?

"A. No, sir.

"Q. *I will ask you to state if any call was made upon McMullen at any time you were connected with the office for anything in the way of help toward the execution of this work, except in the matter of supplying money, that McMullen did not respond to.*

"A. *I should say that he responded to everything except in the matter of furnishing money.* (Record, p. 289.)

"Q. What was it during the first summer up to the twentieth of September; how did the plant furnished by McMullen correspond with the plant which was obtained elsewhere?

(Objected to as incompetent, immaterial and irrelevant, and not cross-examination.)

"A. I should guess it might be one-third of the whole amount." (Record, p. 290.)

It will be borne in mind that it is charged in the bill (record, p. 8) and admitted in the answer (record, p. 39) that Hoffman was to be the active superintendent of the work. McMullen was not expected to render any assistance on the ground.

With regard to the matter of a bond McMullen testifies (record, pp. 167, 182-3) that he offered to assist in its procurement, but that Hoffman voluntarily assumed to get it, and never made any request of McMullen to assist in the matter. The sureties on the bond were P. L. Willis, Hoffman's legal adviser, and G. W. Bates, his former associate in business. Willis testifies on cross-examination (record, p. 378) :

"Q. Referring now to the matter of giving this bond you say that Hoffman said that McMullen was unacquainted here, and that it would devolve on Hoffman to give the bond—Hoffman did not express reluctance to giving it, did he ?

"A. Not that I recollect of.

"Q. He did not lodge any complaint against McMullen at that time about not giving the bond or part of it ?

"A. Not to me.

"Q. Did not he with perfect willingness procure the sureties on this bond, so far as you know ?

"A. So far as I know, yes."

Bates testifies on direct examination as a witness for respondent (record, pp. 412-3):

"Q. You were one of Mr. Hoffman's bondsmen, I believe?

"A. Yes, sir.

"Q. What do you know about Mr. Hoffman having any difficulty about getting his bond?

"A. I do not think he had any difficulty, as far as I know.

"Q. You do not know whether he had any difficulty in consequence of having to get the bond?

"A. No. He asked me if I would go on his bond, and I told him I would. I forget who the other party was."

Not a word was ever heard about the giving of this bond until Hoffman attempted to use the matter for the purpose of defrauding McMullen out of his share of their profits.

In regard to financial questions between the parties we beg to refer the court to the discussion we present in connection with McMullen's appeal (*infra*, pp. 244-255) saying only at this time that *Hoffman did not undertake to dissolve the partnership because of any past delinquency on McMullen's part, but only threatened to do so if McMullen did not send him \$10,000 by September 20.*

Hoffman writes on September 14 (record, p. 579):

"Our estimate is \$66,000, and they have \$40,000 that they are going to divide equally among all the contractors, so we will get about \$20,000, and after paying Wolf & Zwicker and Cook & Kiernan their pro rata, we will have about \$9,000 left to pay about a \$22,500 payroll, station men included, besides iron gates and supplies besides this month. Now, Mac, I am compelled to insist that you raise your portion of this money, as I will absolutely not carry this work any longer this way. You will either have to put up your share of the money or let go of the contract, as you agreed to do. I have held off as long as I could with the hopes that I could swing it alone, but I cannot do it any longer. I don't want you to think that I am taking advantage of hard luck you are in, but you can see the necessity of having money. IF YOU WILL FURNISH \$10,000 BY THE 20TH, I WILL CARRY ON THE CONTRACT THE SAME WAY I DID BEFORE, but this amount I must insist on your furnishing or you must let go, and I will get some one in that will furnish part of the money."

On September 16 Hoffman writes (record, p. 580):

"Now, I want to tell you once for all THAT UNLESS YOU PUT UP YOUR SHARE OF THE MONEY, NAMELY, \$10,000, BY THE 20TH OF THIS MONTH, I

shall not recognize you in this contract after that date, and shall make such arrangements as I see fit."

McMullen answers this letter by saying (record, p. 560):

- "I hardly expected such a proposition from you, Lee, that you would refuse to recognize me in the contract if I did not do thus and so. You must understand that nothing that you can do will change my rights in the premises, and if you attempt anything of the kind you will only injure yourself."

The representation of the status of affairs made in Hoffman's letter of September 14 was in fact false. The August estimate was \$74,229.83, of which ninety per cent., or \$66,806.84, was payable September 20. Dodge testifies for respondent (record, p. 405):

"Q. Now, when was the first time that you knew or were aware that the bonds had been sold and the money paid for the September payment?

"A. On the twentieth of September, about three o'clock.

"Q. Up to that time what steps had been taken looking to the payment of the bills that should fall due on the 20th?

"A. Warrants had been drawn for 30 per cent. of the amount due to the contractors. The

money was divided pro rata by the committee and warrant drawn for each contractor—there were four of them—for 30 per cent. of the amount due to each.

“Q. Of whom Mr. Hoffman was one ?

“A. He was one.”

It is agreed between the parties (record, p. 121) that on September 1 there was on hand to the credit of the work \$14,130.95, to which add \$20,042.05, the percentage which the water committee had informed Hoffman it would pay at all events on September 20, and the result is \$34,173. The amounts payable September 20 were as follows (record, p. 122):

Pay roll for August.....	\$11,982.40
General accounts.	1,198.34
Audited vouchers.....	9,737.68
Wolff, Zwicker & Buehner.....	24,741.37
Cook & Kiernan.....	5,102.43
	<hr/>
	\$52,762.22

But, as is also agreed between the parties (record, p. 119) Wolff, Zwicker & Buehner and Cook & Kiernan were to be paid only as Hoffman was paid by the city, so that if Hoffman had gotten only one third of his estimate they would have been paid only one third of theirs.

The statement therefore would have stood:

Pay roll for August.....	\$11,981.40
General accounts.....	1,198.34
Audited vouchers.....	9,737.68
Wolff, Zwicker & Buehner.....	7,422.41
Cook & Kiernan.....	1,530.72
	<hr/>
	\$31,871.55
Amount available for payments.....	\$34,173.00
Total to be paid	31,871.55
	<hr/>
Surplus	\$2,301.45

Thus it is seen that when Hoffman wrote his letter of September 11 he actually had in hand \$2,301.45 more than was required to discharge all of the September bills necessary to be paid.

Again it is stipulated (record, p. 122) that the city paid Hoffman on September 20, \$66,806.58, to which add \$14,130.95 previously on hand, and after paying all the September bills in full there was left a balance of \$28,175.31.

Now as a result of these calculations we may say primarily that Hoffman never had any such cause as he represented to McMullen for undertaking to dissolve the partnership on September 20.

It is true that McMullen could not have required Hoffman to advance money to the firm on his (McMullen's) account, but Hoffman *had vol-*

untarily advanced all the moneys which were under consideration, and in his letters of September 11 and 16 he did not undertake to dissolve the partnership for any past or existing delinquency of McMullen's. HE CONDONED EVERY THING OF THAT SORT AND SIMPLY THREATENED TO DISSOLVE IT IF McMULLEN DID NOT PERFORM A FUTURE ACT.

Now with reference to this future act, no court would allow Hoffman to avail himself of it as a ground for dissolving the partnership and expelling McMullen from his interest therein without good reason, and no such reason existed in this case. Hoffman could not arbitrarily require McMullen to advance \$10,000, nor put him in default for not doing so, and therefore unless this money was actually needed for the prosecution of the partnership business McMullen's rights could not be affected in any wise by his failure to advance it. We have seen that, so far from being needed, Hoffman paid all of his debts at the time he had notified McMullen to make payment and had nearly \$30,000 over.

Again, Hoffman and McMullen, being partners were the joint and equal owners of the moneys paid by the city, and instead of the \$10,000 demanded of McMullen, he paid through the city on the very day designated, or the city paid for his account, over \$33,000. It was of course entirely immaterial where the money came from, and thus the contingency upon which Hoffman threatened to dissolve the partnership never arose.

This partnership was for a special venture and was intended to last until the venture had been accomplished. McMullen's wilful refusal to go on with the partnership work, or his substantive failure to comply with his part of the agreement might have warranted Hoffman in seeking a dissolution in the courts. But McMullen did not wilfully refuse at any time to do his part, his defaults were not sufficient to warrant Hoffman in dissolving the partnership, and Hoffman could not do it in the manner resorted to by him.

In *Hart vs. Clark*, 6 De Jex, M. & G., 232, a mining venture was entered into upon a stipulation between the parties thereto that they should contribute certain sums of money towards the prosecution of the enterprise, and should share in its results. No regulation was adopted by the associates providing for the expulsion of a member. One of them, however, failed to comply with the calls made upon him for contributions of money, and in consequence of such failure, his associates undertook to expel him from the enterprise, and to appropriate his interest. Lord Justice Turner said (p. 250):

"This is an adventure in which as to the material part of the property embarked in it there was a legal interest vested in the plaintiff. Up to the moment when the alleged declaration of forfeiture was made the plaintiff had beyond all question a joint interest in the adventure, and it is difficult to see how the alleged declaration of

forfeiture, which there was no authority to make, could operate to destroy that interest, or to alter or affect it. The decree seems to have proceeded upon the ground that, no time being limited for the duration of the adventure, the defendants had full power to determine it; and that it was determined by the declaration of forfeiture. But the object of that declaration was to determine the adventure, not as to all the adventurers, but as to the plaintiff alone, entitling the defendants to the plaintiff's share; and I do not see how, in the absence of any special provision for the purpose, the defendants could have the right so to determine it.

"Assuming, however, that the declaration of forfeiture worked a determination of the adventure so far only as the plaintiff was concerned, does it follow that the defendants were entitled to take the plaintiff's share at its then value. In ordinary partnerships, dissoluble at will, the dissolution of the partnership must be followed by the winding up of the concern; no partner is entitled to take to himself the share of another partner, at its then estimated value; and, without going the length of holding that mining adventures are to be considered in all respects as trading partnerships, I certainly am not prepared to hold that there is so great a difference between them as could entitle the defendants so to take the plaintiff's shares. Special provisions may be, and no doubt generally are, inserted in agreements for

carrying on mining adventures to provide for the event of any of the adventurers making default in payment of their due proportions of the expenses of the concern; but, if there be no such provisions contained in the agreements, I cannot think that the adventurers who have paid up, can be entitled to take the law into their own hands as against the defaulters. Resort must as I think in such cases be had to a court of justice to determine what is right to be done between the parties."

The case of *Hartman vs. Woehr*, 18 N. J. Eq., 383, is to the same effect. There three parties entered into a contract to conduct the business of brewing beer. After Hartman had contributed about half the amount of money which he was required to advance by the articles of co-partnership, and the other parties had contributed more than they were required to advance, they undertook to expel Hartman from the firm on the score that he had not complied with his engagements. Hartman sued for an account of the operations of the firm and succeeded. The Chancellor said (p. 385):

"They deny that he [Hartman] is, or ever was, a partner, on the ground that he has never complied with the partnership agreement by paying up his share of the capital. The position taken on their part is, that until that is paid up, he is not admitted as a partner. But this agree-

ment was for a partnership to commence immediately, and to continue for five years. The partners each agreed to pay in \$10,000 of the capital, but it was not a condition precedent. The complainant, by his deed, paid up at the time of the agreement, \$5,667 of his share; and the defendants accepted it, and used, and continued to use, the property in the partnership business. Neither of them paid up his share at that time, but at the intervals of weeks or months afterwards. But the business of the partnership—the erecting of the brewery, and manufacture of beer—went on; each contributed some capital and labor. The existence of a partnership does not depend upon the fact that each partner has, in all things, complied with his agreement. If the contract has been made, property and labor contributed, and the partnership business commenced or carried on to any extent, there is a partnership. In this case, Hartman put in his property, which was taken, and is still used for the business of the firm; he and his property are liable to all the debts of the firm, not only to the notes given in his name, but to all debts incurred, both before and since the thirty-first of January, 1866; and if the firm is unfortunate and fails, he may be stripped of every dollar he is worth. The defendants had a remedy if he did not comply with his engagement; they could have asked for a dissolution, and paid him back the amount he put in, and formed a new partnership. But under this

agreement, he was a partner for five years, unless the partnership was sooner dissolved.

"It was not dissolved by the advertisement of January thirty-first, or by excluding him from the management of the concern. These may constitute a good cause for dissolution; and as he has prayed for it, and the defendants deny his interest, refuse to admit him as a partner, the dissolution must be decreed.

"Hartman, being a partner, is entitled to an account of the profits. Even where the partnership has been legally dissolved, and one of two partners continues to carry on the business, unlawfully using the property of the other in it, the retiring partner is, at his option, entitled to his share of the profits made while his property is thus used; this is settled by a series of well considered cases. See Story on Partnership, Sec. 343; Collyer on Partnership, Sec. 324. This account must be made, with such allowance for the services of the partners who have carried on the business as, under the articles of partnership, is just; and also with allowance of interest for the amount furnished by them in excess of their share of the capital; and the complainant must be charged with interest on the share of the capital to be furnished by him, that was not paid in."

This case exactly covers the one in hand. Hoffman appropriated and used McMullen's property; and if the venture had proved a disastrous

one, McMullen and his property would have been liable for all the debts of the firm.

So, also, in *Ambler vs. Whipple*, 20 Wall., 546, where Ambler and Whipple entered into a co-partnership agreement for the purpose of dealing in inventions and patents. Ambler was the inventor and Whipple furnished the means. After Ambler had perfected a valuable invention Whipple undertook to expel him from the firm on the ground of his misconduct and failure to discharge his duty to the firm. Ambler sued for an accounting. Mr. Justice Miller, speaking for the court, said (p. 557):

"What weight would be given to the charges of bad character, drunkenness, and dishonesty in a suit by Whipple to dissolve the partnership we need not here state. If all that is charged were proved in such a suit it would make a strong case for relief, on such terms as equity might impose for the protection of both parties. But they did not authorize Whipple, of his own motion, to treat the partnership as ended and take to himself all the benefits of their joint labors and joint property."

In *Kimball vs. Gearhart*, 12 Cal., 27, several parties agreed to construct a water ditch, towards the prosecution of which they were to severally make contributions. It was alleged that Howe, one of the partners, had failed to make good his contribution, and his associates undertook to ex-

pel him from the firm, and to appropriate his interest in the property. The court said (p. 48):

"An ingenious argument is made by the appellant's counsel to show that by the failure of Howe to pay his proportion of expenses, the estate he had was forfeited as on a condition subsequently broken, and that all remedies and rights touching the estate, by relation, attached to the other property. We are unable to see the force of the argument. * * * * *

Kimball and Howe were partners in this adventure, with equal rights in the subject of it, and it is evident that the mere failure of one partner to pay his proportion of expenses, or of the debts of the concern, does not forfeit his rights in the common property."

The most valuable asset which the partnership of Hoffman and McMullen had in September, 1893, was the contract with the city of Portland, and this was as much the property of McMullen as of Hoffman. Had the partnership been dissolved at that time, this contract must have been sold to the highest bidder and would have gone to McMullen, if he had been willing to pay more for it than any one else, or else the contract should have been worked out for the joint benefit of the partners. McMullen had also contributed one third of the plant and had rendered personal services to the firm. Hoffman could not violently seize McMullen's interest and appropriate it to

his own use. If any ground for terminating the partnership existed, which we deny, he had his choice to bring a suit for a dissolution and foreclose McMullen's interest by due process of law, or to proceed with the work in hand, which was already under his superintendency until its completion, and on the basis of the profits earned to account to McMullen for his interest. He chose the latter alternative.

It is also perfectly clear that Hoffman never understood that had terminated the co-partnership. He charged his account for salary on his books regularly from May 1, 1893, to December 31, 1894, and drew it for the whole time. (Record, p. 119.)

McMullen testifies (record, pp. 169, 170):

"Q. I will ask you to state whether, at any time, you made demands upon Mr. Hoffman for information in regard to these particulars.

"A. Yes, I made demands upon him.

"Q. What time was it?

"A. About the fourth of December, 1894.

"Q. What was the result?

"A. He refused to accede to my request, and declined to permit me or my representative to inspect the books and accounts of the job.

"Q. What reason did he assign for, if any?

"A. I don't think he assigned any reason.

"Q. You may state whether or not anything was said or discussed between you as to the fact of your interest in the work or its proceeds as an owner.

"A. He never denied my interest in the work.

"Q. My question is whether or not there was any discussion between you on that point.

"A. Yes, there was; I don't know that there was any discussion on that point—when I asked him to show me the books and when I desired to get a general idea of the books—of the condition of the job; he always met me with the proposition to know what I would take for my interest in it, and I always declined to make any offer, to accept any sum, unless the books were disclosed, and that was about the sum total of what transpired at the meeting on the fourth of December, 1894.

"Q. Upon what ground, if you assigned any, did you make your demand for an inspection of the books?

"A. On the ground that I was a partner on the job, and had as much right to see the books as he had.

"Q. And what was his response?

"A. Well, his response was—he got ill-tempered, and his response was that I could not see the books.

"Q. Now, you may state whether or not you ever made a request upon him for a statement or information as to the amount of money which had been earned in the execution of this contract apart from an inspection of the books.

"A. Well, I made a demand on him for a statement of disbursements on account of the job, and the moneys earned; I had a public knowledge, that is, they were public in the papers that could be seen at the water committee's office, of the amount of the estimates every month.

"Q. What was his response to that?

"A. Well, he declined absolutely to give any data whatever relative to the job, and always coupled it with the proposition that I should name a price for which I would sell out."

In what has been stated above we have followed the reasoning of the authorities quoted, and accepted the theory that where a partnership has been entered into for a stated term or a particular adventure, it is not determinable at the will of either of the partners until the time originally contemplated has elapsed. While there is a divergence in the authorities upon this proposition, those which support the theory here advanced have seemed to us to command most respect. This theory of course carries with it the result that whatever declarations one partner may make,

or whatever action he may take, in an attempted termination of a partnership, the parties are nevertheless partners until the term for which they embark in the partnership enterprise has run, unless for good reason the courts are appealed to to effect a dissolution.

In *Karrick vs. Hannaman*, 168 U. S., 328, a case very similar to that in suit was presented to this court. The facts were that the parties to the suit entered into a written agreement of co-partnership, February 3, 1886, by which they were to become partners in a mercantile and laundry business for a term of five years from that date. The capital was \$25,000, of which the plaintiff was to furnish \$5,000 and the defendant \$20,000. The plaintiff was to give his entire time and attention to the partnership business, and the defendant was to devote to it only such time as he saw fit. The plaintiff was to have the general and exclusive control and management of the business, except as to such matters as the defendant might designate, or as should be mutually agreed upon. The excess capital stock advanced by the defendant was to be refunded to him at the expiration of the term of the partnership, and at the end of the term the profits and losses were to be equally shared.

On February 1, 1888, the defendant took possession of all the partnership business and assets and excluded the plaintiff from any further management or participation in the business. The

plaintiff alleged that up to that time he had performed his part of the agreement and stood willing to continue so to do. The defendant carried on the business after February 1 for his own exclusive benefit and applied to his own use the profits realized. On January 1, 1890, the defendant sold out all of the business to a third party. April 17, 1890, the plaintiff brought a suit praying for the dissolution of the partnership, the appointment of a receiver, an injunction against the defendant's interfering with the property, its application to the payment of the partnership debts, and a division of the remainder between the partners, accompanied with a prayer for a cancellation of the sale of the property and an accounting between the partners.

The defendant admitted the partnership and his taking possession of the business on February 1, but denied the other allegations of the complaint, and alleged mismanagement on the part of the plaintiff and a dissolution of the partnership at that time by mutual consent. The cause went to a referee, who, on October 5, 1891, made a report finding the issues in conformity with the allegations of the complaint and awarding plaintiff \$12,040.53.

The suit having originated in the Territory of Utah, went from the supreme court of the Territory up to this court. In the territorial supreme court the plaintiff was given a decree for

\$10,540.53, which decree was affirmed by this court.

The question was raised before this court, but was not decided, whether a partnership for a definite term could be dissolved at the will of one of the partners, this court holding that it was entirely immaterial whether the partnership should be deemed terminated or not, as the rights of the parties upon a final settlement in either case would be the same. On page 337, Mr. Justice Gray says:

"A partner who assumes to dissolve the partnership, before the end of the term agreed on in the partnership articles, is liable, in an action at law against him by his copartner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received. *Bagley vs. Smith*, 10 N. Y. 489; *Dennis vs. Maxfield*, 10 Allen, 138. In a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances. *Ambler vs. Whipple*, and *Pearce vs. Ham*, above cited; *Hartman vs. Woehr*, 3 C. E. Green (18 N. J. Eq.), 383; *Freeman vs. Freeman*, 136 Mass. 260; *Holmes vs. Gilman*, 138 N. Y. 369; 3 Kent Com. 64."

BRIEF AND ARGUMENT ON McMULLEN'S APPEAL.

We shall endeavor to present within a limited compass the case offered by McMullen on his appeal. His assignment of errors is to be found on pages 36-41, *ante*. By reference to this assignment it will be seen that McMullen complains of the decree of the circuit court in the following particulars, viz. :

1. That the court made an excessive allowance of salary to Hoffman for his superintendency of the work; and that instead of \$20,000, or \$1000 per month, there should have been allowed him only \$8000, or \$400 per month.

2. That Hoffman is chargeable with interest on one-half of the aggregate amount of money drawn by him and respondent, from time to time, and appropriated to their own use.

3. That the costs of suit should have been taxed against respondent.

4. That McMullen should have been given a decree for \$62,147.19 together with his costs of suit, instead of \$52,519.80 with costs of suit chargeable against the common fund.

Nothing is better settled in law than that in the absence of a clear understanding and contract between themselves to such end, neither member of a co-partnership is entitled to a salary for his services.

In *Frazier vs. Frazier*, 77 Va., 775, it was held by the court of appeals of Virginia, that the allowance of compensation to a surviving and managing partner, on the settlement of partnership accounts, for services rendered by him in attending to the business of the partnership, was, in the absence of an agreement to that effect, plainly wrong, and in violation of the well settled rule of law upon the subject. The law is fully and accurately stated in this opinion. It is said (p. 792):

“Upon the appeal here, the first assignment of error to be passed upon by this court is the allowance of an annual salary to the surviving partner, William Frazier, under the circumstances of this case. This is a question which has been most elaborately argued on both sides; but which appears to the court to be well settled by the decisions of this court.

“In the case of *Forrer vs. Forrer*, in 29 Gratt. 134, Staples, J., speaking for the whole court, said: ‘No rule of law is better settled than that one partner is not entitled to compensation for his services while employed in the partnership business, unless it be so agreed between the parties.’ The doctrine is thus laid down by a writer of ac-

knowledgeed merit: 'As it is the duty of each partner to devote himself to the interests of the concern, to exercise due diligence and skill for the promotion of the common benefit, it follows that he must do it without any reward or compensation, unless there is an express stipulation to that effect. And there is no difference in this respect, though the duties performed by the partners have been very unequal in value and amount.' Collyer on Partnership, section 183. See also Strong [Story] on Partnership, section 182; Parsons on Partnership, page 130.

"In *Franklin vs. Robinson*, 1 Johnson Chancery Report, Chancellor Kent said he knew of no case which entitles one partner to charge for his services, except upon the ground of special agreement. In another case it appeared that one of the partners had taken the almost entire and exclusive charge and superintendence of the business of the firm, and yet it was held that his claim for compensation could not be allowed. *Phillips vs. Turner*, 2 Dev. & Battle Eq. R.; *Patton's Ex'or vs. Calhoun's Ex'ors*, 4 Gratt. 138.

"The reason for this rule is, each partner in taking care of the joint property, is, in fact, taking care of his own interest, and is but performing his own duties and obligations growing out of the partnership. These duties and obligations are supposed to enter into and constitute a part of the consideration for others to engage in the

business with him. The partners are considered as meeting on a common ground, each engaging to do all that he can do for the common good.

"In the second place, the law cannot undertake to measure and settle between the partners the relative value of their various and unequal services bestowed on the common business, and for the obvious reason it is impossible to see how far the relative experience, skill, ability, or even known character and reputation of each entered as ingredients in the adjustment of the terms of the partnership. If a partner is unwilling to perform any very unequal service without reward, he ought to stipulate that it be allowed him. In the absence of such stipulation, it must be presumed he is willing to render the service without remuneration. Parties assuming this relation are presumed to know the law, and to intend to be governed by it, unless they agree to be bound by some other rule. It is a mere question of degree. So soon as the courts undertake, upon a mere estimate of a partner's services, to award compensation in one case, they must do so in all cases where the skill, labor and diligence are unequally bestowed. This would be simply to abolish the rule of law, and to place the right to compensation not upon contract, but upon the principle of *quantum meruit*. It will be found, upon examination, that the doctrine of nearly all the cases is, that compensation can only be allowed where there is an *express*

agreement to that effect, or one necessarily to be implied from the conduct of the parties."

And in *Cunliffe vs. Dyerville Manufacturing Co.*, 7 R. I., 325, the supreme court of Rhode Island said (p. 327) :

"A contract of co-partnership presupposes it to be for the common benefit of all of the co-partners; and there being no stipulation to the contrary, that each shall devote as much of his skill, capital, or labor, as may be necessary for the attainment of the ends for which the co-partnership was formed, without separate reward. Contracts of this character are defined to be a *joining* together of the money, knowledge, experience, or labor, of two or more, voluntarily, and for a common purpose. This common purpose is ordinarily a common pecuniary gain. Each co-partner receives, or expects to receive, his compensation out of this common profit or gain."

It is true that in his bill McMullen, not under stress of any obligation but in a spirit of liberality, expressed a willingness to concede to Hoffman a fair measure of compensation for the service he had rendered the firm, but he never supposed that in so doing his own services were to be totally ignored, or that any exorbitant allowance would be made Hoffman. In his appeal McMullen acquiesces in an allowance to Hoffman of \$400 per month, saying nothing of any compensation to himself, and we submit that this is ample pay-

ment to Hoffman for all he did, even if McMullen had done nothing whatever. If the universal rule which prevails in such cases were applied here Hoffman would get nothing, and the court is not warranted in making of McMullen's failure to insist upon this rule an occasion for dealing lavishly in his property rights for Hoffman's benefit.

We understand that respondent attempts to justify the allowance of \$1000 per month to Hoffman upon these grounds, viz.:

1. That Hoffman had the burden of the active superintendency of the contract with the city, and the other work performed in connection therewith.

2. That Hoffman was required to provide a bond.

3. That Hoffman was put to great effort and sacrifice to raise money to carry on the work in the summer of 1893.

In answer to the first point we say that Hoffman was required to do nothing more than he had agreed to do, without any stipulation for compensation, by the terms of the contract which served as the inducement for McMullen to go into partnership with him. The contract makes no stipulation for compensation to Hoffman, and there is not a particle of evidence in the record going to show that it was ever agreed between him and McMullen that he should receive any compensation.

McMullen testifies:

"Q. I will ask you to state what the arrangement was between Mr. Hoffman and yourself in regard to the active supervision and prosecution of the work contemplated by your contract, exhibit No. 1?

"A. Well, it was agreed and understood between us that the business to be done in Portland or in Oregon would be attended to by Mr. Hoffman, because he resided here, and knew the water committee, and the engineer, and was familiar with everything here, and it was also agreed that inasmuch as we had an office in New York, we had an office in San Francisco, and an office in Seattle; it was agreed that any outside business that was to be transacted in the interests of the partnership at these places would be attended to by the San Francisco Bridge Company at my direction. (Record, p. 167.)

"Q. You say it was understood that Mr. Hoffman was to do the business here in Oregon—whatever there was here he would do it?

"A. We arrived at that conclusion when we determined to put in a bid in his name.

"Q. But if there was anything to be done outside, you were to do that in San Francisco, New York, or Seattle?

"A. Yes, sir.

"Q. That was a part of your agreement that you were to do that?

"A. That is right." (Record, p. 185.)

Bush, respondent's witness, testified (record, p. 289):

"Q. Was it not the agreement, Mr. Bush, that Mr. Hoffman, being the local man on the work, was to have the immediate supervision of it?

"A. I understood it so.

"Q. From whom did you get that understanding.

"A. Well, I think from Hoffman.

"Q. And McMullen was not expected, was he, to come up here from San Francisco and take active control of the work, either jointly with Hoffman or singly?

"A. No, sir."

In the correspondence exchanged between the parties, which is to be found in the record, there is not the slightest suggestion that Hoffman expected to be paid, or that McMullen expected he should be allowed, any salary. Hoffman never even suggested that the duties which he was performing were more onerous than those falling on McMullen. On the contrary his only complaint was that McMullen was not furnishing his proportionate part of the money, and in his letter of September 11, 1893 (*ante*, p. 6), he writes: "*If you will furnish \$10,000 by the twentieth, I will*

carry on the contract the same way I did before." Of course Hoffman's own book entries touching his salary cannot be used as evidence to bind McMullen.

The character and extent of Hoffman's responsibilities and labors have been greatly magnified by respondent. It is stipulated (record, p. 119) that the work of manufacturing the pipe and of hauling it from the factory to the place where it was to be used was sublet to other parties, the one amounting to \$180,000 and the other to \$36,000, (record, pp. 421-2) thus relieving Hoffman and McMullen from the most burdensome part of their contract, and leaving to them only the work of excavating the trench, placing the pipe in it, and covering it over; the value of the contract work being reduced to \$249,667. Hoffman, himself, was only nominally superintendent of the work. Bush testifies (record, p. 272):

"Q. After the letting of this work—this contract—what did you do?

"A. You mean as regards construction?

"Q. Yes, sir.

"A. Well, there was a space of three months before the work actually begun, and I did everything I could towards getting ready, getting tools prepared, and when the work first started my principal work was going back and forth between the shop and field, trying to get the pipe out

there, and getting the pipe made fast enough at the shop; the subcontractors were very slow at first in getting the pipe from the shop; and in a general way I got ready all the tools for riveting, and I hired a good many riveters and sent them out—riveters and calkers—and I went over to Vancouver at one time; I only got one man there that I intended to make a foreman of; he afterwards had a subcontract for the riveting and calking. *Mr. Foy was made superintendent of the work.*

"Q. What time?

"A. At the beginning of the actual construction.

"Q. Do you know when that was?

"A. That was early in June.

"Q. How long did he continue as superintendent?

"A. I think until the first of November, 1893.

"Q. Of the same year?

"A. Yes, sir.

"Q. *Who became superintendent after he quit?*

"A. *I was superintendent after that time.*

"Q. *Until the completion of the work?*

"A. *Yes, sir.*"

On cross-examination Bush testifies (record, p. 292):

"Q. He [Hoffman] was not giving his exclusive time and attention to this contract, was he?

"A. I think he was giving most of his time and attention to it.

"Q. Most of it?

"A. Yes, sir.

"Q. Well, what proportion would you say?

"A. Well, I should say at least three-fourths of his time."

And again:

"Q. What I want to get at is this: When did Mr. Hoffman's active superintendence and contribution of his time in whole or largely so towards the conduct of this work cease?

"A. Well, I should say his active work might be considered to have extended up to the first of December, 1894; after that he did not have so much to do. Of course, there were a few men out there all the time during the six months that we had to keep the line in repair.

"Q. Then I understand that Mr. Hoffman was continuously engaged on the work as superintendent from June, 1893, to October, when he went to the World's Fair, and then upon his return from the World's Fair in October until January, 1894, when the work was shut down, from January, 1894, to March, when operations

were resumed, and then from March until the following December?

"A. Yes, that is the time when we had the most to do. From last December on several months we got telegrams almost every day about leaks on the line." (Record, p. 294.)

In addition to an active superintendent of the work the testimony of A. Donnell proves that a bookkeeper was employed (record, p. 248), and he was employed himself as "manager of the office" (record, p. 249). Donnell also testifies that during three months in the winter and spring of 1894 the work was practically suspended, the estimates being for insignificant amounts, while Hoffman was charging \$1000 per month for his salary. So much for Hoffman's work.

March 16, 1893, Hoffman answers a proposition McMullen had made to sell his interest in the contract by saying (record, p. 496): "I don't care to buy you out now. I think our contract is good, and we will make much more than you ask, *but as it is a new line of work I want your assistance.*" McMullen testifies (see especially record, pp. 167-8), and the correspondence shows, that he did render constant assistance to Hoffman in launching the work in the spring and summer of 1893, and Bush admits (record, p. 289) that McMullen *did all he could, and responded to every call made upon him, except in the matter of furnishing money.* This default was not wilful, but

the distressing financial stringency of 1893 had embarrassed McMullen along with innumerable other business men throughout the country.

McMullen testifies further (record, pp. 225-6):

"Q. You may explain fully just what you did do in connection with the procuring of this contract, and its execution, being as concise and collective as possible.

"A. Well, we started in to find out the cost of the job, and we started in with all our ability and resources to estimate with our engineering staff, which consisted of Mr. George W. Catt, who is in charge of our office in New York, and who is a civil engineer by profession, and an experienced contractor, and also Mr. Herman Krusi, our assistant engineer, and Mr. H. S. Wood, also a civil engineer, and we proceeded to estimate this job, and to gather data in the east as to the cost of other or kindred or similar jobs, one at Rochester, New York, and one in Jersey City, New Jersey.

"Q. How much time was given by these gentlemen to this work, approximately?

"A. All the time from early in January, 1893, to the letting of the contract, and after the letting of the contract a very large portion of their time, and my own time, until the job was well under way, at the end of July or first of August, 1894.

"Q. Who paid these gentlemen during the time you were engaged in this work, and what were the salaries they were drawing?

(Objected to as immaterial.)

"A. The San Francisco Bridge Company paid their salaries; Mr. George W. Catt was paid a salary of \$5,000 a year; and Mr. Herman Krusi was paid a salary of \$3,600 a year, and Mr. H. S. Wood was paid a salary of \$2,100 a year, and my own salary was \$5,000 a year.

(Counsel for defendant objects to this testimony as immaterial.)

"Q. How much time did these gentlemen bestow on this work at your instance, or that of the San Francisco Bridge Company, if any, after the contract had been awarded, and the execution of the work was entered upon?

(Same objection.)

"A. Well, as I said before, the greater portion of their time from the date of the award to the end of August, that would be a period of about five months.

"Q. How much of your own time, between the letting of the contract and the twentieth of September, 1893, was devoted to the work?

(Objected to as immaterial.)

"A. A large portion of my time, I cannot say exactly, but looking back over the correspon-

dence, I find that there was almost daily something to be done in connection with this job."

The San Francisco Bridge Company and McMullen as to this work were one.

We find that Hoffman charged, and the trial court allowed, a salary from May 1, 1893, to December 31, 1894, twenty months in all. The testimony shows that active operations were not begun until June 1, 1893, and virtually terminated December 1, 1894, while, as has been shown, they were practically suspended for three months during the winter and spring of 1894. Hoffman has therefore been allowed compensation at the full rate for five months when he had little or nothing to do.

Hoffman could not of course take advantage of his own wrong and command a larger salary after he refused to co-operate with McMullen in September, 1893, than would have been proper had they continued together. The money matters between them were all adjusted by the payment made by the city September 20, and beyond this McMullen always responded, and stood ready to respond, to all demands made upon him.

So much has been said about the matter of Hoffman's advances of money that we feel warranted in giving the court a full exposition of that subject.

It appears from the record (p. 120) that on the first of July, 1893, McMullen had contributed to the venture \$2,316.89; that prior to June 30, Hoffman had contributed \$3,100.27; and that on and after June 30 up to September 20, when we shall show all of his advances might have been repaid, Hoffman made the following contributions:

June 30	\$ 29.75
" "	72.90
July 1	7,000.00
July 28	5,000.00
July 31	3.64
" "	800.88
August 31	1,550.44

The total of all advances up to September 20 made by Hoffman was \$17,557.88, and those made by both parties aggregated \$19,874.77, of which amount Hoffman should have advanced \$9,937.39. He therefore was required to advance for McMullen \$7,620.49, and this could have been withdrawn September 20, 1893. If we allow two months interest at eight per cent., we find that Hoffman sustained an injury by McMullen's default of \$101.60! This on work approaching half a million dollars in amount. The interest charge went of course as a credit to Hoffman and might have been withdrawn on September 20.

With regard to the efforts alleged to have been made by Hoffman to raise money and the sacri-

fices which he claimed to have made in that connection the following testimony is conclusive.

William M. Ladd, the managing partner of the banking house of Ladd & Tilton, called as a witness for respondent, testifies:

"Q. Now, I will ask you if you had any conversation with Mr. Hoffman in reference to arranging for funds to meet the bills that were likely to accrue on account of the work that he was carrying on in constructing this line of pipe—laying this pipe for conducting Bull Run water to Mt. Tabor?

"A. I understand that what you want to know is whether he came to get any money of me or to make any arrangements?

"Q. That is what I want to know, if you had any conversation on that subject.

"A. Yes, I had.

"Q. State what it was.

"A. As near as I can recollect, Mr. Hoffman came to me twice in regard to borrowing money, because he anticipated the possibility of the water committee not disposing of their bonds and be able to pay him the payments as they came due, so he wanted to be in a position to keep up with his sub-contractors; *I told him he could have the money, but he never came for it*; I think he did borrow money at different times of me, but I don't

think they were sufficient sums to warrant being for this particular work.

"Q. He did not call for the money, but made arrangements for it?"

"A. Yes, sir; he came and asked if he could have it in case he did not get it from the water committee, and I told him yes."

"Q. Are you willing to fix the date of that conversation, or approximate the date?"

"A. Well, I cannot fix the date beyond this, that it would be as the date approached for receiving his money from the (record, p. 354) water committee; now, Ladd & Tilton's books show that he received on the twenty-first, I think, of September, 1893, a large payment, which I think came from the water committee, because the check which went to his credit was on the First National Bank; I think that his books show that."

"Q. Now, do you remember if that conversation that he had with you was prior to that time?"

"A. Yes, I cannot place the date, but I feel certain that it was; and then there must have been some other time when they were in the same fix, because I recollect he came twice at least in regard to the matter."

On cross-examination Ladd testified:

"Q. When was the other time, before or after this?"

"A. I cannot say, Mr. Cox; it was during the panicky season, when the bonds were hard to sell and get money for them.

"Q. Are you able to determine that the conversation concerning which you first spoke took place prior to the twenty-first of September at all?

"A. Yes, sir, I think so; the reason for my thinking so is that he came, as I said, twice, and there might have been more times, and if he [we] could establish the question as to when the bond sale was made, it was prior to that time; it was then a question as to whether the sale would be made or not.

"Q. Assuming that the sale of bonds was made on the twentieth of September, 1893?

"A. I think the sale of bonds was made on the sixteenth.

"Q. On the sixteenth?

"A. I think one of the conversations was prior to that time, possibly both.

"Q. You are not sure about that?

"A. No.

"Q. Is it not a fact, Mr. Ladd, as far as your knowledge extends, that Mr. Hoffman was never in any apprehension of the shortage of money of the water committee until this September payment?

"A. That I cannot say.

"Q. Can you say that he was—do you recall his ever having made any representations to you that he was in any difficulty and in fear that he would not get his money from the water committee except this payment which was made to him on the twentieth of September? (Record, p. 355.)

"A. I don't know that he said he was in any difficulty at all; *my impression is that he came to me when he first made the contract, and talked about money matters in case he needed money to carry out the contract, he wanted to know if he could depend upon it*; he was in the habit of asking for funds from time to time whenever he required money to carry on his bridge contracts; he always had collateral on deposit in our vault, so that that was there, and while I cannot place any particular date, I can remember his coming to the side counter there and talking with me in regard to the difficulty he anticipated in regard to the water committee not getting this money. (Record, p. 356.)

"Q. You say it was customary with Mr. Hoffman to get these accommodations from you in his general business?

"A. Yes, he would get them at times; I don't think that in late years he was very much of a borrower for his bridge business; he had some matters with Mr. Willis that he had some notes along at times; but I looked yesterday at his in-

dividual account, and there was in September a balance there of \$15,000 to his credit.

"Q. To his credit?

"A. Yes, sir.

"Q. His individual account, or his Hoffman & Bates' account?

"A. His individual account.

"Q. How was his Hoffman & Bates' account?

"A. Something about \$13,000 at the commencement of the month, and run down possibly to about \$11,000; I did not pay special attention, but I just run my fingers across the line.

"Q. I understand that all that passed between Hoffman and yourself at this time that he thought he would fail to get his pay on the twentieth or twenty-first of September, 1893, was that he came to you and asked if in default of getting that estimate you would advance him sufficient money to carry his pay-roll and other expenses at that time, and you told him you would do so, and that he went off and never returned to follow the matter up.

"A. I do not recollect that he said anything about pay-rolls or anything of that kind; he said his needs might be for money to take care of his payments, but I did not go into the question of detail of what his payments were.

"Q. To make his general payments? (Record, p. 357.)

"A. *He asked me if he could have money in case he needed it ; I said, ' Yes, sir,' but he did not come back to get the money ; I think he got his money each month.*

"Q. Is it a fact what took place between you on the twentieth of September, that Hoffman put a check with you for deposit to his credit for a very much larger amount than he had outstanding?

"A. I don't know whether they were larger than he had outstanding ; he deposited a large check, \$60,000.

"Q. It was very much larger than the amount he drew against it in the next thirty days ?

"A. I could not say without looking.

"Q. Did you examine his books to see the condition of his account after the twenty-first of September ?

(Objected to as not cross-examination.)

"A. No, sir, I did not look to see whether in the month of October there was any payments made to him ; I don't recollect what his balance run in October ; the only recollection that I have of his balance is in the month of September it continued the same without any particular variation ; Hoffman & Bates' account was increased on the twenty-first of September by a deposit of \$66,000, and that same day I think he checked for about twenty odd thousand dollars." (Record, p. 358.)

P. L. Willis testifies as a witness for respondent (record, pp. 363-4):

"Q. Now, Mr. Willis, did Mr. Hoffman tell you anything about the matter of procuring funds for carrying on this work?

"A. Yes, Mr. Hoffman was very much troubled about means for carrying on the work. His contract was let only a few months before the financial depression which struck us in July, 1893, and immediately after which it appeared almost impossible to raise funds. He told me Mr. McMullen was unable to furnish any money towards the prosecution of this work, and he was very fearful that he would be unable to raise sufficient funds himself, and indeed at times told me that he did not believe he could do it at all, and he put forth strenuous efforts, he told me, and some of this I was cognizant of, besides what he told me. He had an account for labor performed on some railroad work on the Sound, quite a considerable sum due him, that was admitted by the company whom the work was for, and another considerable sum that he claimed for force or extra work that was questioned by the company, and he, in order to secure funds and money for the preparation of this work, took the money which the company admitted, and abandoned his claim as compensation for extra work; it was only on that condition that the company would pay any sum, and he abandoned this claim—I think it was some \$5,000—that he claimed for force work which he abandoned in

order to obtain about the same sum of money as I recollect it, upon the undisputed claim. That was for the purpose of having it to use in the prosecution of this Bull Run contract."

Robert Wakefield testifies as to this transaction:

"Q. You say that you were concerned with Mr. Hoffman in the bridges on the Great Northern?

"A. Yes, sir. (Record, p. 423.)

"Q. Who did you say the contract was with?

"A. Hoffman and Bates and Robert Wakefield.

"Q. That was yourself?

"A. Yes, sir.

"Q. When, if you know, was settlement made with the Great Northern for the work which had been done under that contract—the final settlement?

(Objected to by counsel for defendant as immaterial and irrelevant.)

"A. I do not know just when the final settlement was made. I disposed of my interest to Mr. Hoffman before that, and I do not know when it was made.

"Q. How much was owing from the Great Northern on this contract at the time you made your settlement with Hoffman? (Record, p. 424.)

(Objected to by counsel for defendant as immaterial.)

"A. Well, we claimed about \$12,000.

"Q. Of what did that claim consist?

"A. It consisted of, I think, about \$12,000 for a small bridge that we used and some bridges that had been washed out that they claimed they were not responsible for.

"Q. Well, I will put it to you in another way—was there any agreement between yourself and Hoffman on the one side and the Great Northern on the other as to the amount of your claim?

(Question objected to by counsel for defendant as immaterial and irrelevant.)

"A. Yes, sir.

"Q. What proportion was in dispute?

"A. Between \$4,000 and \$5,000.

"Q. How much was allowed?

"A. Well, I cannot say. After I sold out of course I took no further interest.

"Q. I mean while you were there; how much did you understand that they did not dispute?

"A. There was \$12,000 altogether and between \$4,000 and \$5,000 in dispute, would leave about \$8,000, actually conceded.

"Q. Now I will ask you if you know what those disputed items consisted of?

(Counsel for defendant objects to the question as immaterial and irrelevant.)

"A. They consisted of a small drawbridge that we used, and there was one span that had been washed out that we claimed they were responsible for and they claimed we were.

"Q. What amount was claimed for this drawbridge?

(Counsel for defendant objects to the question as immaterial.)

"A. \$2,000 was the claim.

"Q. What had been the cost and what was the value of that drawbridge?

(Counsel for defendant objects to the question as immaterial.)

"A. Well, I put it into the firm when I went in to the firm with Hoffman at \$500." (Record, p.425.)

This is probably a fair illustration of what constituted Hoffman's *sacrifices*; and, if he made any, Ladd's testimony shows that they were entirely unnecessary.

This testimony conclusively corroborates what we have said above to the effect that Hoffman was guilty of falsehood in his letters to McMullen of September 11 and 16. He represented that he did not have money to meet his September payments *and could not get it*. We have shown that he actually had in hand the full amount required

of him, and Ladd's testimony shows that he might have had for the mere asking any sum which he at any time might have needed. McMullen of course had no right to require Hoffman to borrow money on his own credit for his (McMullen's) account, nor did he ask it. He made a perfectly rational and business-like proposition in his letter of September 14, that Hoffman should take city bonds on his estimates and borrow money on them as collateral for the prosecution of the work. Hoffman rejected this proposition and would consider nothing short of McMullen's sending him \$10,000. The whole transaction bears manifest suggestion that Hoffman found by the large estimate for the August work the contract was going to prove a profitable one, and was attempting to avail himself of McMullen's misfortunes in order to drive him out of the contract and fraudulently appropriate all its gains to himself.

We realize that these suggestions would ordinarily be out of place in this connection, but they are made proper and pertinent by the attempt which respondent makes to justify the allowance of an extravagant salary to Hoffman on the score of his alleged difficulty in raising money to carry on the work.

Now as to valuations put upon Hoffman's services. McMullen produced as witnesses Robert Wakefield, John Bays, D. P. Thompson, J. B.

Montgomery, S. W. Aldrich and J. B. David, all residents of Portland or its vicinity. Respondent produced as witnesses H. C. Campbell, C. F. Swigert and G. W. Bates.

Wakefield testified (record, p. 426) that he had been a general contractor all his life; that he had been superintendent of bridge building for the Union Pacific and the O. R. & N. Co.; that he had done \$300,000 worth of contract work for the Union Pacific; that he had built the terminal depot at Portland, the contract being \$300,000; that he had built the cantalever bridge at Albany, Oregon, and the bridge over Snohomish slough. It may also be remarked that Wakefield was so friendly to respondent as to become a surety on her appeal bond. (Record, p. 115.)

Bays testified (record, pp. 431-2) that he had been a contractor for thirty-five years, chiefly in railway work; that he had worked on the Oregon & California Railway on a contract of over \$370,000; that he had done \$200,000 worth of work on the Siskiyou tunnel, and over \$130,000 on the Wolf Creek tunnel.

Thompson testified (record, pp. 438-9) that he had been a contractor for about forty years in public surveys, construction of river jetties, building of railroads, constructing tunnels for railroads, and erecting waterworks; that one of his railroad contracts amounted to the sum of \$7,000,000; that the contract for building the jetty at the

mouth of the Columbia river amounted to \$250,000; that the tunnel work at the Bunker Hill tunnel and the Siskiyou tunnel amounted to perhaps \$500,000.

Montgomery testified (record, pp. 446-7) that he had been a railroad builder and general contractor for some twenty-five years; that he had had a contract for building the Linden bridge across the Susquehannah river, was interested in the Oil Creek & Alleghany railroad, and had built forty-five miles of the Kansas Pacific; that he had built one hundred and forty-five miles of the railroad between Portland and Tacoma, and sixty or seventy miles of the Willamette Valley railroad.

Aldrich testified (record, pp. 456, 461) that he had been a contractor for about ten years on work of most all kinds, from waterworks to tunnels on railroads, and also in railroad building; that his contract for building the reservoirs on the waterworks system in controversy amounted to \$70,000 or \$80,000; that his railroad contract amounted to about \$400,000.

David testified (record, pp. 480-1) that he had been a contractor for about twenty-five years. Had built roads, government work of different kinds, mills, railroads, etc.; that the largest contract he had been engaged upon was a railroad involving over \$3,000,000; that he had had various government contracts, running from \$50,000 to \$150,000.

The following hypothetical question was submitted to each one of these witnesses (record, pp. 432-4):

"I desire to ask you this question, and take your opinion upon it: Hoffman and McMullen went into copartnership March 6, 1893, to do work for the water committee of the city of Portland in the matter of bringing Bull Run water to Portland under a contract which stood in Hoffman's name. The contract price was \$465,667, and the contractor was required to furnish a bond in the sum of \$140,000, which bond was secured by Hoffman, the sureties being two in number, one a former partner of Hoffman, and the other an attorney who had previously done business for both Hoffman and McMullen. By the terms of the contract between Hoffman and McMullen each of them was to contribute an equal amount of capital to the prosecution of the enterprise, and they were to share equally in its profits and losses. It was also agreed that Hoffman, being a resident of the city of Portland, was to have the active superintendence of the work, but that McMullen, who resided in San Francisco and controlled offices there, and in New York and Seattle, should render all services which should be required of him at those points. The work of manufacturing the pipe, amounting to about \$180,000, was let on subcontract, as was also the work of hauling the pipe into position, amounting to about \$36,000. The work under the Hoffman

contract was actually begun in June, 1893, and between March 10, 1893,—the date of Hoffman's contract with the water committee,—and the commencement of the work, both parties were engaged in preparing for active operations, Hoffman planning and outlining a course at Portland, and collecting plant, laborers, etc., and McMullen working on the same thing in San Francisco, Seattle and New York. Upon the commencement of active operations in June, Hoffman assumed the superintendency of the work, and gave it all necessary attention, and McMullen continued his aid of the character above indicated until September 20, 1893. During [this] time Hoffman gave attention at times to his private business affairs, but had no other contract work on hand, while McMullen, in addition to his attention to this work, was also engaged in other contract operations. Of the plant, consisting of implements, tools, livestock, machinery, camping outfit, etc., required for the work between June and September 20, 1893, Hoffman found two-thirds and McMullen one-third, the value of the latter being estimated from \$1,600 to \$2,300. Owing to his inexperience in such work, Hoffman required and made use of the work and information furnished by McMullen, and the latter complied with every request made of him by Hoffman except in the matter of furnishing money until September 20, 1893. During this time an engineer and superintendent of the field work, to-

gether with a purchasing and disbursing agent and a bookkeeper, were employed at the expense of the firm. Between June and September 20, 1893, McMullen advanced no money to the firm except that represented by his contribution to the plant above mentioned; but Hoffman advanced from his private means at various times in the months of June, July and August, 1893, the sum of fourteen thousand five hundred dollars, or thereabouts, which was covered by his estimate paid by the water committee on September 21 [20], 1893, and thereafter Hoffman did not have or need not have had any money of his own in the job. Money was very tight, and salaries and wages were affected thereby, as you have testified. In the partnership contract between Hoffman and McMullen, there was no provision made for the allowance of a salary to Hoffman for his services. In the light of these facts, what do you deem to be proper salary to Hoffman for his services rendered by him over and above the value of the services contributed by McMullen during the period of time between March 6 and September 20, 1893?"

(Counsel for complainant objects to the question on the ground that it is based on an incorrect and incomplete statement of facts.)

Wakefield answered that Hoffman ought to have rendered his services as a partner in the concern, but that if he was going to have a salary at all, "you could not very well afford to offer less

than five or six thousand dollars;" and that in making this estimate he allowed nothing for what McMullen had done; that it was always the rule in such cases for both partners to devote such time as was necessary to the work. (Record, p. 429.)

Bays testified in answer to this question: "\$400 a month, I should say, would be a big salary." That he had served as superintendent on the contracts above mentioned upon which he was engaged and never got more than \$250 dollars a month. (Record, p. 434.)

Thompson testified that \$5,000 a year would be full compensation to Hoffman, if McMullen had done nothing; and that if McMullen rendered services, the compensation allowed Hoffman should be influenced thereby; that at about the time this work was going on, the only similar work he knew of was a contract for furnishing stone for the jetty at the mouth of the Columbia; that the total contract was about \$350,000; that Perry Hinkle (who was also a partner in the contract) had charge entirely of the work and received \$150 a month for his service as superintendent; that Hoffman was a partner with the witness in this contract. (Record, p. 440.)

This witness made the following statement:

"As good men as I know of, or men that I would as readily have trusted as Mr. Hoffman—

and Mr. Hoffman was a trusty man, because I know from experience—could have been had for \$200 a month. But I have estimated the responsibility that attached to Mr. Hoffman as having sole charge of the work without Mr. McMullen having anything to do, as \$400 a month." (Record, p. 443.)

Montgomery testified that \$500 a month to be charged against the firm would be an ample salary to allow Hoffman (record, p. 454); that when witness was engaged in the construction of railroad building in the Willamette Valley he had employed Hoffman and paid him \$135 a month. (Record, p. 449.)

Aldrich testified that \$325 or \$350 a month would be an ample allowance to Hoffman. (record, p. 459); that he and a partner had had a contract on the Kalama Railroad for \$350,000 or \$400,000, and he drew a salary of \$150 a month as superintendent; that he was general superintendent of everything. (Record, p. 461.)

David testified that \$400 a month would be fair compensation to Hoffman for his services; that the ordinary wages for people superintending that sort of work was from \$200 to \$400 a month (record, p. 483); that upon this same work Hinkle, who acted as superintendent of the laying of pipe, under a contract with three other parties, got \$10 a day for his services; that on the job for furnishing stone for the jetty of the Columbia River,

Hinkle, who took charge of it, got \$150 a month; Hoffman was one of the partners; that on the large railroad contract mentioned by witness, Bates, who was superintendent, got \$250 a month for acting as general superintendent of the work, and he had a third interest in the contract; that Bates had eleven or twelve hundred men under him. (Record, p. 484.)

As against this testimony H. C. Campbell testifies that he had been a general contractor since 1886. (Record, p. 306.)

Thereupon the witness gave the following testimony. (Record, p. 307):

"Q. Supposing a man having that contract amounting to some \$46,500, [\$465,000] having to execute a bond for its performance to the amount of \$140,000, required to furnish money for a plant to carry on the work, amounting to \$15,000, or \$20,000, had to provide the means for carrying on the work in the way of tools, and the best plan for conducting it, and having general superintendence of it—what do you say it would be worth per month for a man to do that sort of business?

(Counsel for the complainant objects to the question on the ground that it assumes an incomplete state of facts as shown by the evidence.)

"A. Well, it would be a very valuable position, and responsible one, to find a man to take

hold of it and do it; should think it would be a liberal salary.

"Q. How much?

"A. It would be a very liberal salary for a man to take that responsibility.

"Q. What sum would you say would be a reasonable salary for that work?

"A. I should think that a man ought to have one thousand or twelve hundred a month."

On cross-examination this witness testified that he did not have a very great appreciation of McMullen's services (record, p. 311); that he had made this allowance to Hoffman on the assumption that McMullen had thrown on Hoffman the burden of carrying the whole work through and had rendered him no assistance (record, p. 312); that he thought Hoffman's services were worth this much, regardless of anything McMullen did; that he had gotten a good deal of his knowledge about the matter from Hoffman. (Record, p. 313.) Then follows this testimony:

"Q. Now, what you know about this matter, Mr. Campbell, is what you have learned from Hoffman, is it not?

"A. A good deal of knowledge comes from him; yes, sir.

"Q. What do you know about it at all as to what McMullen did and what Hoffman did, except what Hoffman told you?

"A. I saw the work that was being carried on.

"Q. Saw Hoffman as active superintendent?

"A. I have been out that way over the work two or three times, and I know how the work was carried on, to a certain extent. I am quite well posted.

"Q. But your knowledge as to what McMullen did, or what he did not do, you gathered from Hoffman?

"A. You might say that; there would be no other way to gather it.

"Q. Mr. Hoffman talked with you frequently about this matter, did not he?

"A. Yes, sir.

"Q. Gave you his side of the grievance between himself and McMullen?

"A. Yes, sir.

"Q. And you formed an opinion in regard to these topics concerning which you have been giving testimony from this information communicated to you by Hoffman?

"A. Principally.

"Q. You and Mr. Hoffman were very close friends, were you not?

"A. Always very good friends.

"Q. And he communicated very freely with you in regard to this matter?

"A. We have often talked it over; yes, sir."

Swigert testifies that he had been treasurer and "sort of agent" of the Pacific Bridge Company since 1880; that the business of this company was general contract work (record, p. 335); that he had superintended the building of bridges, wharves, and some little grading work; that he had worked on one job in Central America, the price of which was \$115,000; that the largest work he had done in Oregon and Washington was about \$80,000 (record, p. 336); that he thought \$15,000 a year would not be too much for Hoffman's services (record, p. 337); that witness had had a number of interviews with Hoffman touching the troubles between himself and McMullen, especially one in July, 1894 (record, p. 340); that witness was on very intimate terms with Hoffman and had been associated with him in business; that he had felt and expressed sympathy for Hoffman in his relations with McMullen; that this was based upon the representation of the matter which he had received from Hoffman (record, p. 341); that the extent of the witness's experience in railroad work was grading about ten miles of road in California; that he had furnished and laid water pipe in Astoria amounting to about \$40,000 all told (record, p. 343); that on the railroad work mentioned witness was employed as

timekeeper (record, p. 344). On page 345 of the record this witness gives the following testimony:

"Q. Now, Mr. Swigert, do you know, during the whole time that you have lived in Oregon, any man on any similar work, whether in character or value, who has filled the position that Hoffman has filled, and who got \$15,000 a year for his services or half of that?

"A. No; I do not know what they got.

"Q. Do you know any instance in which a superintendent, making a charge or claiming a charge against work in any degree similar to this, either in character or amount, has claimed or been allowed, whether he was the contractor himself or operating for others, one-half the amount which you say would be a proper compensation in this case?

"A. I do not know of any similar case; I do not know of anything that I would call a parallel case at all."

That on the Kenewick Bridge, which amounted to \$300,000, and the snow sheds on the Northern Pacific, which ran up into hundreds of thousands, and which were constructed by Hoffman and G. W. Bates, they were both working partners, and Hoffman and Bates simply divided profits (record, p. 347); that if McMullen rendered services he should be allowed for them, and the value of McMullen's services should be deducted

from the allowance made Hoffman. (Record, p. 349.)

Bates testified that he had been a contractor for about nine years, principally in bridge building; that he thought the largest contract he had had was about \$200,000, and Adler and Hoffman were his partners; that he was engaged in business with Hoffman for seven years; that he had talked over with Hoffman the matters in suit (record, p. 410); that he should judge \$1000 a month would not be too much as compensation to Hoffman for his services (record, p. 412). On cross examination this witness gave the following testimony (record, p. 413):

"Q. Mr. Bates, have you ever known of anyone occupying the position Mr. Hoffman occupied on this work—engaged in any similar work—during the time that you have been a contractor in the state of Oregon, getting anything like the salary which you say would be a fair salary to allow Mr. Hoffman for what he did?

"A. No, sir.

"Q. What did you estimate [base] your estimate on, then?

"A. Simply on the responsibility of carrying on the work.

"Q. You understood, of course, that Mr. Hoffman was a partner, and was to get a half inter-

est in the proceeds of the job in addition to his salary?

"A. I should judge so; yes, sir.

"Q. Do you know of any other person occupying the position that Mr. Hoffman occupied in regard to this work who was ever allowed or paid one-half the amount that you say would be fair to allow Mr. Hoffman for his services?

"A. Not personally; no, sir.

"Q. What is the largest salary you ever knew to be allowed or paid to a person occupying Mr. Hoffman's position in connection with this work—with reference to any similar position on any similar work?

"A. Well, I do not know that I know of any.

"Q. Do not know of any?

"A. No, sir; I do not personally know of any.

"Q. Now, of course, you were on very friendly terms with Mr. Hoffman during his lifetime?

"A. Yes, sir.

"Q. On very friendly and intimate terms?

"A. Yes, sir; I was associated with him in business for seven years."

We get this monthly average of the estimates given by McMullen's witnesses:

Wakefield	\$ 500.00
Bays	400.00
Thompson	416.66
Montgomery	500.00
Aldrich	350.00
David	400.00
	<hr/>
	\$2,565.66
Average	\$ 441.66

Respondent has been given here the maximum figures stated by the witnesses, and no allowance whatever is made for McMullen's services. It seems nothing less than extraordinary that the trial court should have ignored the testimony of these disinterested and experienced men of affairs, and have based its findings on the testimony of respondent's three witnesses who admit that they were without experience in such matters, that they had never heard of any such allowances as those they testified were reasonable, that they were associates and close personal friends of Hoffman, that they were in sympathy with his side of the case; and whose minds had been poisoned by his recitals of the grievances he had against McMullen, which recitals were made after the occurrence of the breach between them.

We submit that the salary of \$400 per month which McMullen has expressed a willingness to allow for Hoffman's services over the value of his own is the extreme sum which any fair consideration of the testimony will justify.

McMullen is entitled to an allowance of interest at eight per cent. per annum, the Oregon rate, on half the moneys drawn by Hoffman and respondent from the profit account of this work and appropriated to their own use; the interest charges to be computed from the dates of withdrawal.

We are perfectly willing to concede that the general rule is that in cases of partnership settlements interest is not to be charged on excess amounts drawn by the partners until a balance is struck between them, but there are exceptions to the rule and McMullen's case comes clearly within the exceptions.

In *Griggs' Appeal*, 62 Penn. St., 73, Sharswood, J., says on page 79:

"The fifth assignment of error is 'in charging John Gyger interest prior to the settlement of accounts between the parties.' Mr. Lindley remarks that the principles upon which, in taking partnership accounts, interest is allowed or disallowed, do not appear to be well settled: 1 Lindley on Partnership 649. In some cases it has been held that the period of the dissolution of a partnership is the proper time to make a rest for this purpose: *Stoughton vs. Lynch*, 2 Johns. Ch. R. 209; *Hollister vs. Barkley*, 11 N. H. 501. Judge Story has laid down a different rule. 'Interest,' he says, 'is not allowed upon partnership accounts generally, until after a balance is struck on a settlement between the partners, unless the parties have other-

wise agreed or acted in their partnership concerns:’ *Dexter vs. Arnold*, 3 Mason 289. Vice-Chancellor Sandford, of New York, in *Beacham vs. Eckford*, 2 Sandf. Ch. R. 116, after a review of all the authorities, came to the conclusion that there is no general rule established, but that the allowance or refusal of interest depends upon the circumstances of each particular case. This seems much the safest principle to adopt in view of the confidential relation of the parties, and the variety and complication of such accounts. No unbending rule could be laid down which would not, in particular instances, work great injustice.”

In *Lynch vs. DeViar*, 3 Johns. Cas., 303, it is said on page 309:

“I think the respondent is entitled to recover the interest. The proceeds of these speculations were received by the appellants in cash. The proportion due to Gardoqui was so much money in their hands, received to his use. It is a settled rule, that money received to the use of another, and improperly retained, always carries interest.”

Karrick vs. Hannaman is a case in point on the matter of interest charges. The partnership was formed February 3, 1886, and was to continue until February 3, 1891. February 1, 1888, the defendant took possession of the property. January 1, 1890, the defendant sold the property and received the purchase price. The account was

not stated in court until October 5, 1891, but in the settlement the plaintiff was allowed interest from January 1, 1890, on his share of the moneys received by the defendant on that date, and which should then have been paid over. This allowance was sanctioned by the supreme court of Utah and by this court.

It is stipulated (record, p. 122) that Hoffman and respondent drew the following sums of money from the profits of this contract, omitting the sum of \$15,663.30, drawn by Hoffman September 30, 1894, to repay his advances, and in addition to the amounts of \$8,000 drawn December 30, 1893, and \$12,000 drawn September 30, 1894, for salary:

January 31, 1895	\$ 8,855.04
June 17, 1895.....	40,000.00
July 1, 1895	10,000.00
August 5, 1895.....	13,882.66
	<hr/>
	\$72,737.70

Hoffman's withdrawal of all these moneys was a declaration on his part, and it was true in fact, that they could safely be taken out of the partnership treasury. He thereupon held half of these amounts to the use of McMullen and ought to have paid it over; but instead of doing so he applied the money to his own purposes and presumably made a profit on it, wholly excluding McMullen from its use. This money was held until June 23, 1896, the date of the final decree,

most of it for more than a year, and no allowance is made to McMullen therefor.

This is not the ordinary case of the disentanglement of partnership accounts, in which interest is not usually allowed until a decree is entered settling the rights and interests of the partners; but here one partner had attempted to drive the other from the firm, had denied that he possessed any interest in it, had seized upon all of the partnership property and assets, had appropriated them to his own use, and had deliberately striven to defraud his copartner out of his property. It is a parallel case with *Karrick vs. Hannaman*, but under the circumstances attending the two partnerships a far more infamous attempt to commit a wrong, and if it was proper to allow interest in that case, it certainly is in this.

McMullen should have been allowed his costs of suit against respondent.

The rule which largely leaves the taxation of costs to the discretion of the trial court in equity cases, and the rule that in the settlement of partnership accounts costs are ordinarily chargeable against the common fund, are admitted; but we insist that the same considerations which warrant the allowance of interest against respondent demand an award of costs against her, and that it was a clear abuse of discretion on the part of the trial court to make McMullen bear any part of the costs, in the light of the findings and decree

which were made in his favor. We do not care to discuss this matter at any length, as the facts speak for themselves. That the action of the trial court in the matter of costs is reviewable here is shown by the following authorities:

In 1 Foster's Federal Practice (2 Ed.), section 326, the author says, citing decisions of this court:

"In equity, the award or denial of costs is always in the discretion of the court; and so very frequently is their amount when awarded. When, however, it is said, as it often is, that the award of costs in equity is purely discretionary, it should not be supposed that courts of equity are governed by no fixed principles in their decisions relative to the costs of proceedings before them. All that is meant by the expression is that, in awarding costs, they will take into consideration the circumstances of the cases before them and the situation or conduct of the parties, and exercise with reference to these points a discretion governed by certain reasonably definite rules, the enforcement of which is not dependent upon the caprice of the judge by whom each cause happens to be heard, but is often a ground of review by an appellate tribunal."

In *Ex parte Robinson*, 72 Ala., 389, it is said on page 391:

"In the imposition of costs, the chancellor exercises a legal discretion, governed by precedent,

and by general rules applicable to the varying circumstances of particular cases. But this discretion is exercised and exhausted, when a decree for the payment of costs is embodied in a final decree settling the equities of the case, and defining and declaring the rights of the parties. If from such a decree an appeal was taken, the decree as to costs would be open to modification or reversal, if in other respects there was found in it error, or that an alteration of it was just and equitable."

In *Hamer vs. Giles*, L. R., 11 Chan. Div., 942, it is said on page 944:

"It appears to me that where there is no fault on either side, but the partnership accounts have to be taken in this Court, the costs of the action for taking the accounts from the beginning ought to be dealt with as all other costs of necessary administration, that is, they must come out of the partnership assets. Of course, where an action for dissolution is rendered necessary by the misconduct of a partner—as, for instance, where a partner whose duty it is to keep the accounts has neglected to do so—the Court not only has jurisdiction, but is bound to exercise it, by making that partner pay so much of the costs as are occasioned by his misconduct."

In this cause the answer admits (record, p. 40) that on December 4, 1894, months before this suit was commenced, McMullen requested of Hoffman an inspection of the partnership books

and accounts and demanded an accounting of the firm transactions, and that Hoffman refused, and ever after refused, to render to McMullen any account or to allow him any inspection of the records. McMullen thus discharged every duty resting upon him, and Hoffman wilfully brought upon himself the litigation. When it comes to making McMullen pay a penalty for securing his rights under such circumstances we need only quote the language of Mr. Justice Miller in *Trustees vs. Greenough*, 105 U. S., 527, 538, that: "This system of paying from a man's property those engaged in the effort to wrest it from him can never receive my approval."

We submit that a fair and equitable statement of the account between these litigants, and of the amount for which McMullen should be awarded a decree, is that made in his claim (record, pp. 127-8) viz.:

Total allowed and received	
from city of Portland..	\$509,825.22
For extra work	14,496.74
	<hr/>
	\$524,321.96
Profits of camp, store, sale	
of livestock, interest,	
etc	
	<hr/>
	15,339.76
	<hr/>
	\$539,661.72
Total gross cost of work,	
including salary of \$8,-	
000 to Lee Hoffman....	
	<hr/>
	422,622.13
Balance	
	<hr/>
	\$117,039.59

Amount retained by city of Portland on account of contract.....	\$ 50,982.52
On account of extra work..	2,263.43
	<hr/>
	\$ 53,245.95
Less amount paid Wolff, Zwicker & Buehner....	18,627.17
	<hr/>
Now held by the city of Portland.....	\$ 34,618.78
Amounts drawn out by Lee Hoffman and defend- ant.....	*84,737.70
	<hr/>
	\$119,356.48
Amount to be paid to San Francisco Bridge Co....	2,316.89
	<hr/>
Balance as above.....	\$117,039.59
One-half thereof owing Mc- Mullen	58,519.80
Interest owing McMullen at the rate of 8 per cent. per annum to June 23, 1896, date of decree, as below :	
Interest on half of \$4,800, excess drawn for salary on December 30, 1893, from said date	476.80

<i>Brought Forward,</i>	\$58,996.60
Interest on half of \$7,200, excess drawn for sal- ary on September 30, 1894, from said date ..	498.40
Interest on half of \$8,855.- 04, drawn January 31, 1895.....	494.91
Interest on half of \$40,000, drawn June 17, 1895....	1,626.66
Interest on half of \$10,000, drawn July 15, 1895....	375.51
Interest on half of \$13,882.- 66, drawn August 5, 1895	490.45
Interest on \$2,316.89, ad- vanced by complainant, to December 30, 1893..	83.80
	<hr/>
	\$62,566.33
Less interest on \$17,609.91, advanced by Lee Hoff- man from the several dates of advances to November 1, 1893.....	†419.14
	<hr/>
Balance	\$62,147.19

*This is made up of \$12,000, excess salary drawn by Hoffman, added to the amount of his withdrawals stated on page 273, *supra*.

†November 1, 1893, is taken as the date when this money might have been safely withdrawn, as shown by the condition of the Hoffman & Bates bank account on that date. (See record, p. 121.)

For this amount, together with eight per cent. interest, the Oregon rate, from June 23, 1896, and costs throughout the whole course of the litigation, McMullen should have a decree.

This decree should also adjudge that McMullen is the half owner of the other assets of the firm, as was found by the trial court (record, p. 95), viz.: Plant and tools, cost price, \$6,234.60; furniture and fixtures, cost price, \$187.85; camp fixtures, cost price, \$1,246.16; miscellaneous accounts, \$188.75; disallowed claim against the city of Portland, \$16,961.25.

Respectfully submitted,

WILLIAM A. MAURY,
L. B. COX,

Attorneys for John McMullen, Petitioner.

No. 271
Reply Bx. of Maury & Cox for
Supreme Court of the United States.

OCTOBER TERM, 1898

Filed April 25, 1899
No. 271

OFFICE SUPREME COURT U.
FILED

FEB 25 1899

JAMES H. MCKENNEY,
CLERK

JOHN McMULLEN, PETITIONER,

vs.

JULIA E. HOFFMAN, EXECUTRIX OF LEE HOFFMAN,
DECEASED.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S BRIEF IN REPLY.

WM. A. MAURY,
L. B. COX,
Of Counsel for Petitioner.

WASHINGTON, D. C., 1605 Pennsylvania Avenue.

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Supreme Court of the United States,

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PETITIONER'S BRIEF IN REPLY.

The seeming determination of respondent's counsel not to concede anything to the petitioner's case has betrayed them into some serious misapprehensions and misstatements which we desire to correct, and but for which no brief in reply would have been called for, there being nothing in the argument of respondent's brief that had not been anticipated and, we think, refuted.

The Court will see that we have good right to complain of the manner in which counsel have attempted to explain away the case of *Brooks vs. Martin* (2 Wall., 70). It was quite impossible for us to be prepared for the statement made and repeated by them, (pp. 137-139,) that the articles of partnership in that case were for an innocent and lawful purpose, in the face of the finding of this Court, with all the evidence before it, that the end and object of that partnership were to traffic in soldiers' claims, contrary to the prohibition of the act of Congress, and that the *ostensible* purpose stated in the articles of association was not the real one.

After misstating the fundamental fact in *Brooks vs. Martin*, counsel ask, with some triumph, where is the similarity between that case and the one now before the court?

The efforts made by respondent's counsel to distinguish this case from *Brooks vs. Martin* and thus escape the force of that decision are advanced with much apparent seriousness, but they fall lamentably far short of accomplishing the end in view. Indeed every attempt made to combat or avoid the force of the opinion in that case only results in fastening it more securely upon the pending controversy.

Two propositions are laid down in respondent's brief in this connection: First, that the partnership in that case was to do a lawful thing, whereas the partnership in the pending case was to do an unlawful thing; and, secondly, that the violation of law in that case was not against public policy, while the violation of law in this case is against public policy.

It is true that the partnership contract in that case provided *on its face* for a traffic in land warrants and scrip, but it was alleged (and we make this assertion upon the strength

of a personal inspection of the printed record) in the answer that this was a misrepresentation of the purposes of the parties and the engagement into which they had entered, that they had agreed to operate and had actually operated in the purchase of soldiers' *claims for warrants*, and that the written contract had been studiously worded as it appeared for the express purpose of avoiding the act of Congress which forbade such business. The inherent character of the partnership contract and operations were urged by Brooks in defense of Martin's suit. Mr. Justice Miller said :

" We think that, in point of fact, the allegation of the answer,— that the traffic in which this firm engaged was the buying up of soldiers' *claims*, before any scrip or land warrants were issued, and not the purchase and sale of bounty land warrants and scrip,—is true. We have as little doubt that the traffic was illegal."

That these operations were not in the view of the court outside of the partnership agreement, but in execution of its purposes, is made manifest a little further along in the opinion, where it is said (page 79) :

" Or if Brooks, after the signing of these articles of partnership, had said to Martin, ' I refuse to proceed with this partnership, because the purpose of it is illegal,' Martin would have been entirely without remedy. If, on the other hand, he had said to Martin, ' I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum, which I require you to advance according to your agreement,' Martin might have refused to comply with such a demand, and no court would have given either of his partners any remedy for such a refusal."

No necessity exists for any further answer to respondent's first position.

The argument advanced in this portion of respondent's brief must have been made in forgetfulness of the criticism

of McMullen's position in the pending case, found on page 107. It is there said :

"The bill states only so much of the agreement as makes it appear to have been honest and legal ; but the evidence shows that the pleader has not stated the real facts. He has omitted all that show the illegality. But this the evidence supplies. Under such circumstances, while the facts as stated in the bill might not render it demurrable, still, on a final hearing upon the evidence the facts disclose a condition just as fatal to the plaintiff's case as though he had stated the whole truth, and by so doing had plead himself out of court."

If we now parallel the two bills and the evidence taken in the two cases, the distinction between them upon the contention of respondent's own counsel is entirely imperceptible.

With regard to the second proposition, viz., that the acts of Brooks and Martin were not opposed to public policy, while the acts of Hoffman and McMullen were, we will say no more than that it is the first time we have ever heard the argument put forth that some violations of law are compatible with the good order of society, while others are not.

It is not believed that this Court will countenance the idea that the government and people of the United States had not a deep interest in the enforcement of legislation to prevent the bounty intended for the Veteran Soldier from being intercepted by speculators and sharpers, or that their solicitude for his protection was less worthy of the attention of the Courts than the principle of public policy invoked by respondent, especially when it is considered that the refusal of the Courts to enforce contracts in violation of the prohibition against dealings in soldiers' claims was the only way to give effect to the sanction of the statute

that such dealings should be "*null and void to all intents and purposes whatsoever.*"

The further position taken by counsel for respondent, that a distinction is to be drawn between Brooks *vs.* Martin and the pending case on the ground that in the first the contract between the parties was fully executed, while here it was not, is equally untenable. In this respect the two contracts were in the same condition. In Brooks *vs.* Martin all the facts touching their contract and operations were detailed in the bill, and its prayer was that the court would reinstate the contract, would appoint a receiver of the partnership property then in the possession of Brooks, would adjust the respective rights of the partners, give Martin a decree for the amount to be found due him by an investigation of all the partnership transactions, and enforce it against Brooks and the property of the firm. This is in effect just what is asked here.

Another gross misstatement is that the contract between Hoffman and the City of Portland is admitted to be void. That contract proved entirely acceptable to the City and was the basis of heavy payments of money from the City to Hoffman, some of them with full knowledge of all the developments of this case. Hoffman and McMullen performed the work called for by the contract and the City accepted and paid for the performance. It seems, therefore, inadmissible to speak of the contract as void. At the outside, the contract, if contaminated by illegality in the bidding, was merely *voidable* at the option of the innocent party, the City, which had the right to compel its performance.

Undoubtedly it was excessive partisan zeal that betrayed

the learned counsel into taking the position that respondent can challenge the validity of her testator's contract with the City, especially after the latter has, by acceptance and acquiescence, in the light of all the facts, lost the right to raise the objection. The mere fact of starting such a question here amounts to a surrender of the respondent's case.

Nor is it true that this cause is based on the contract between McMullen & Hoffman of March 6, 1893 (R., p. 492). As has been shown in our original brief, that contract merely evidenced the relation of equal partners between the contracting parties, and the mutual stipulations that the profits and losses should be equally shared between them being precisely what the law requires in such a case, it is not to the contract, but to the worthier right under the law, as by a species of remitter, that the parties would appeal in case of disagreement as to either matter.

It results, therefore, that so soon as the contemplated partnership was launched the contract of March 6, 1893, became *executed* and incapable of sustaining a suit of any kind; which completely disposes of respondent's contention that this suit is to enforce that contract.

Undoubtedly the perspicuous statement of McMullen's case required a particular reference to the partnership articles, but it is an egregious mistake to suppose that this reference made the articles a part of the gravamen of the complainant's bill. The failure to see this is the source of much erroneous discussion in the opposite brief.

The learned counsel attempt to establish an identity between contracts to commit felonies and share the fruits thereof and contracts to do things not necessarily harmful in the particular case, but objectionable because of some tend-

ency to induce a public inconvenience, as in this very case, where Hoffman's executrix is seeking to evade just responsibility by setting up illegality in the agreement with McMullen for procuring the contract with the City of Portland,—a contract which has proved beneficial to the City, and against which the City has never raised any complaint. The books are full of instances of such contracts, such as contracts to insure seamen's wages, contracts tending to create a perpetuity, contracts in restraint of trade, limitations of estates dependent on a certain person being raised to the peerage, and many others collected in the opinions in the celebrated case of *Egerton vs. Earl Brownlow* (4 H. Lds. Cas., 1), which serve to make more apparent the wide gulf that separates this class of contracts from that of contracts or conspiracies to commit felonies.

Failing to note this distinction, the Court below dignifies, by making a part of its opinion, the following extravagant attempt of the Supreme Court of North Carolina, in *King vs. Winants*, (71 N. C., 469, 474) to run a parallel between the two classes of contracts :

"Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler, the other rifles his pocket of \$1,000, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a Court of justice hear them? No case can be found where a Court has allowed itself to be so abused. Now, if these robbers had taken the \$1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the Court to settle up that legitimate business, the Court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks vs. Martin*, *supra*, so much relied on by plaintiff."

Common sense revolts at the bare suggestion, that *Brooks vs. Martin* and the supposed case stand on the same footing. The latter relates to a heinous crime, destructive of the public peace and the sacred principle of property—a crime leveled at the very fabric of government, and belonging to a class where the earlier law allowed no civil redress to the individual injured against the wrongdoer, and where the later law suspends the right to such redress until after the wrongdoer shall have been convicted or acquitted of the offense charged. (See *Higgins vs. Butcher*, Yelv., 90a, note 2, Metcalf's Ed., Andover, 1820.)

If now the offense to the party robbed, in the case supposed, became, at common law, drowned or merged in the "offense to the Crown," it may well be questioned whether any action would lie by one participant in the robbery against the other for his share of the fruits of the crime, under any circumstances whatever.

In *King vs. Winants* (*supra*) the plaintiff and defendant agreed not to bid against each other for a government contract to be given to the lowest bidder, and to share the profits of the contract when given to one of them, and the contract having been awarded to the defendant it was held that the plaintiff could not maintain an action to bring him to an accounting for the profits, the contract being against public policy and void.

It is to be noted that the court were not unanimous, Rodman, J., having dissented on the grounds that "*this case cannot be distinguished from Brooks vs. Martin*, 2 Wall., 70," and that "*the plaintiff can make out his case without going into proof of the fraudulent transactions.*"

Now it is in this case that we find the genesis of the idea,

that before an action can be maintained, for the division of the profits of an illegal contract, by one party to the contract against another, there must have been some transformation of those profits into something different from what they were when first earned. Nor is it remarkable that a court, unable to perceive the difference between an action for the profits of a contract to commit a felony and one for the profits of a contract to do something not necessarily harmful or objectionable in itself, but having a tendency more or less detrimental to the public good, should have advanced this doctrine of transubstantiation, and then argued itself into the conviction that it was only enforcing the doctrine of *Brooks vs. Martin*.

The court below having been captivated by the parallel instituted by the North Carolina court between actions to share profits earned under contracts to commit felonies, and similar actions under contracts against public policy, naturally fell a victim to the auxiliary doctrine of transubstantiation, and, as the former court had done, attempted to explain away *Brooks vs. Martin* and other decisions of this court of the same character.

It is true some of the scrip, in that case, had been regularly assigned by the soldier himself, or had been located on public land, some of which had been sold and conveyed away, and notes and mortgages taken for the unpaid purchase-money, but clearly these were *purely adventitious circumstances*, noticed, to be sure, by the Court, but not entering into the *ratio decidendi* of its decision.

As this Court says, remarking on the case of *Tenant vs. Elliot* (1 B. & P., 3), "the plaintiff recovered, on the ground that the implied promise of the defendant arising out of the

receipt of the money for the plaintiff, was a new contract, not affected by the illegality of the original transaction" (McBlair *vs.* Gibbes, 17 How., 232, 236), thus effectually disposing of the new-born theory that the fruits of an illegal enterprise must undergo some transformation before any duty to share them with another will support an action.

This single remark of the Court shows that if none of the particular circumstances in Brooks *vs.* Martin had existed the decision of that case must have been the same as it was.

Returning now to the case at bar, the moment the money earned by McMullen and Hoffman came into the hands of the latter, the law implied a contract on his part to pay McMullen his share of it. This implied contract was wholly independent of the express contract, said to be infected with illegality, and made it entirely feasible for McMullen to bring Hoffman to an accounting, without invoking the so-styled illegal contract. It is a *concessum* that if Hoffman had admitted his liability to account to McMullen or had expressly agreed to pay him his share of the profits after receiving them, a bill, like the present one, would have been maintainable, which gives up the case, because the contract, which the law implied in favor of McMullen, has all the potency of an express undertaking, being, as this Court say in McBlair *vs.* Gibbes (*supra*), "*not affected by the illegality of the original transaction.*" (See also Planters' Bank *vs.* Union Bank, 16 Wall., 483, 499, 500, and Armstrong *vs.* Toler, 11 Wh., 258.)

On pages 127 and 128 of respondent's brief, the assertion is in effect made, in an argument attempting to uphold the circuit court of appeals, that an express promise will support an action to recover a share of profits derived from the per-

formance of a void contract, while the law will not raise an implied promise from such conditions. This contention is irreconcilable with the decision in the case of *Planters' Bank vs. Union Bank* (16 Wall., 483, 499), where it is said :

"It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the Court will not unravel the transaction to discover its origin."

To this should be added the important consideration that the profits for which it is sought to hold Hoffman's estate accountable are not the wages of iniquity, as in the cases relied on by respondent, but the meritorious fruits of labor and capital expended in establishing a water supply for a city.

The persistency with which respondent's counsel refuse to see the distinction between a case where the illegal contract is the cause of action and a case where the relation of such contract to the action is only incidental and collateral, is truly remarkable.

In the latter case the contract is looked at by the Court for the mere purpose of ascertaining whether the plaintiff and defendant hold such a relation towards one another as will warrant the implication of an assumpsit by the defendant to pay the plaintiff some part of the fruits of the illegal adventure, but the action itself rests entirely on the duty of the defendant to the plaintiff raised by operation of law. This is clearly shown by Chief Justice Cooley, speaking for

the Court in the case of *Willson vs. Owen* (30 Mich., 474), where the treasurer of an association organized for illegal purposes sought to defeat an action by his associates for their share of the earnings, by setting up the unlawfulness of the enterprise, but without success, the Court saying :

* "The illegality of this association ONLY APPEARS INCIDENTALLY IN EXPLAINING WHENCE THE MONEYS WERE RECEIVED ; but the ground of recovery is that the moneys were received for the plaintiffs, and it is not material how or on what account they came to his hands, if in fact for the plaintiffs' use. The distinction between such a case and one in which the suit seeks the enforcement of the illegal contract is well pointed out by Mr. Justice Nelson in *McBlair vs. Gibbes*, 17 How., 235, 239."

In *Frost vs. Plumb* (40 Conn., 111), the Court say that if the plaintiff can show "a complete cause of action without being obliged to prove his own illegal act, ALTHOUGH SUCH ILLEGAL ACT MAY INCIDENTALLY APPEAR, AND MAY BE IMPORTANT EVEN AS EXPLANATORY OF OTHER FACTS IN THE CASE, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal."

Both the learned Court of Appeals and the counsel for respondent fail to note the radical difference between the class of cases to which *Atchison vs. Mallan* belongs and the class to which the case at bar belongs.

In *Atchison vs. Mallon* there was no way by which the plaintiff's object could be obtained but through an illegal executory contract. The case stood on precisely the same basis as *Thomson vs. Thomson* (7 Ves., 473), where Sir Wm. Grant seemed to lament that there was nothing "collateral" to the illegal agreement on which a "collateral demand" could arise.

Besides, in *Atchison vs. Mallon*, as in *Thomson vs. Thom-*

son, there was an agreement to divide the salary of a public office, which was alone sufficient to condemn the contract.

In neither of those cases was there anything in the hands of the defendant on which a specific trust could be fastened, or from which the law would imply, *ex æquo et bono*, an *assumpsit* collateral to the contract.

If in either of them the defendant had held money the product and fruit of the property or capital of the plaintiff and was refusing to account to plaintiff for his share of it, on the ground that the same was the result of an executed illegal contract, undoubtedly there would have been present something "collateral" which would have warranted the Court in making the defendant a trustee *in invitum*.

Turn again now to *Brooks vs. Martin*. Brooks had a considerable amount of property in his hands which was the fruit of Martin's capital. The illegality which, it is alleged, infected their transactions was past and gone, and the property Brooks held was in part the property of Martin, and therefore equity fastened a trust on it for Martin's benefit, on the great principle of general jurisprudence that no one should be allowed to enrich himself at the expense of another.

The illegality being out of the way and a thing of the past, why should the party in possession have been allowed to rob his associate?

Now the case at bar is on all fours with *Brooks vs. Martin*. Hoffman's estate claims to hold on to all the profits of a contract of which McMullen and the respondent's testator were joint owners. The illegality set up in defence being a thing of the past, why should Hoffman's estate be allowed

to rob McMullen of his share of the joint property any more than Brooks should have been to despoil Martin?

If in *Atchison vs. Mallon* the defendant had paid over to a third party a sum of money to be handed to Atchison, clearly such third party could not have successfully resisted a suit by Atchison for its recovery, on the score of illegality in the original agreement.

A number of decisions in addition to those whose introduction was anticipated in our principal brief have been submitted by counsel for respondent, perhaps those most relied upon being *Hunter vs. Nolf*, 71 Penn. St., 282; *Hyer vs. Richmond Traction Co.*, 80 Fed., 83; *Morrison vs. Bennett*, 52 Pac., 553; *Hunter vs. Pfeiffer*, 9 N. E., 124. These cases all present instances where the promise sought to be enforced had as its foundation an illegal consideration, and we think this is true of all the authorities cited by respondent's counsel. We trust we have already made plain the distinction between such cases and the one at bar.

In *Sharp vs. Taylor* (2 Phill. Ch. R., 801, 818), a case relied on by this Court in *Brooks vs. Martin*, the Lord Chancellor says, in delivering judgment:

"As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwí-e clear title of the other? In this particular suit, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can shew that, in realizing it, some provision in some act of Parliament has been violated or neglected? Can one of two partners, in any import trade, defeat the other, by shewing that there was some irregularity in passing the goods through the custom-house? The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties."

It would seem impossible to deny, with success, that the case at bar falls within the principle laid down in *Brooks vs. Martin and Sharp vs. Taylor* and the cases therein cited.

The principle on which the Courts proceed is, that the dishonest defense of illegality is not to be countenanced when raised too late to arrest performance of the illegal purpose. It is for the vindication of the law and not out of regard for the defendant that the defence is entertained. But if it should be allowed after the illegal act has been done, it would not be then for the sake of the law but for the sake of the defendant alone, who is an abomination in the sight of the law. The defence is, at best, demoralizing, but it is the lesser evil. To countenance it, however, after the greater evil has passed beyond temporal correction, would be deplorable. The mischief to law has then been done, the past cannot be recalled, and, therefore, nothing remains but to enforce fair dealing between the parties who claim to share the fruits of the illegal transaction.

This idea is forcibly put by Mr. Justice Miller in *Brooks vs. Martin*. He says :

“ It is difficult to perceive how the statute, enacted for the benefit of the Soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so. * * * The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the Court in this case.”

And it is pertinently asked by the Court, in another case : “ Why should one of the co-workers be permitted to add a *fresh iniquity*, by retaining the whole, contrary to his agreement ? ” (*Owen vs. Davis*, 1 Bailey (Law), 315).

To allow the defence of illegality under such circumstances would be "*to exercise rigor beyond the limits of wholesome severity*" (Harvey *vs.* Varney, 98 Mass., 123), and "TO ENCOURAGE HYPOCRISY AND GROSS DISHONESTY" after all the harm that can be done to the public by an infraction of law has already occurred (Gilliam *vs.* Brown, 4 Miss., 664).

Before leaving this branch of the case we deem it proper to correct a mistake of fact into which counsel for respondent has fallen. In our principal brief we set forth the contract of March 6 in which occurs this passage:

"It is further hereby agreed that if either of the parties hereto shall get a contract for doing *or do* any other part of the work let or to be let by said committee for bringing Bull Run water to Portland the profits and losses thereof shall in the same manner be shared and borne by said parties equally share and share alike."

It is asserted by counsel for respondent that we have misquoted the contract, its language being said to be "or to do" instead of "or do," the implication being that the whole stipulation was addressed only to specific contract work, and that McMullen was to have no interest in any other work performed on the water system. We do not think the point possesses any merit, but it is the respondent's counsel who has misquoted the contract and not we. (See Record, pp. 492-'3.)

THE CONTENTION THAT McMULLEN FORFEITED HIS INTEREST
IN THE PARTNERSHIP.

The flimsiness of this contention is shown by attention to the real facts.

The basis of the partnership between McMullen and Hoffman was the contract between the City of Portland and Hoffman and Bates.

The contract was, undeniably, a valuable asset, and mainly the product of the efforts of McMullen. That McMullen was largely instrumental in securing the contract is shown by the fact that he had a half interest in it and that Hoffman was to bear the whole burden of superintending the work to be done under it.

This was but a fair return for his services and for the great expense to which he had been put in supplying the necessary estimates and data on which the bidding was to be based, and, undoubtedly, all would have gone well but for the difficulty, at first, of floating the bonds of the City.

In the presence of these facts, could a more extreme proposition be started than the contention, gravely relied on, that Hoffman has deprived McMullen of his half interest in this valuable asset simply by reading him out of the partnership because, as he fraudulently pretended, McMullen had not come to his relief when he needed money to meet the expenses of executing the contract?

No such proposition finds support anywhere. Mr. Lindley, a recognized authority, lays down the law, as follows:

"In the absence of an express agreement to that effect, there is no right on the part of any of the members of an ordinary partnership to expel any other member. Nor, in the absence of express

agreement, can any of the members of an ordinary partnership forfeit the share of any other member, or compel him to quit the firm on taking what is due to him. As there is no method except a dissolution by which a partner can retire against the will of his copartners, so there is no method except a dissolution by which one partner can be got rid of against his own will" (p. 616).

It is thus not by *ejection* but by *dissolution* that an objectionable partner can be gotten rid of, and dissolution means the *due accounting and adjustment of rights between the former partners*, but the odious idea of forfeiture does not enter into it.

It is not necessary, however, to consider whether Hoffman succeeded in effecting a legal dissolution of the concern, by refusing to recognize McMullen any longer as a partner, because *the latter's rights would be the same either way*, as was held by this Court, in the precisely similar case of *Karrick vs. Hannaman* (168 U. S.), where one partner ousted his copartner from the concern and took the business into his own hands exclusively, and carried it on successfully.

In holding that the excluded partner had the right to share in the profits of the business as completely as though nothing had happened, the Court said :

" Even if the partnership should be considered as having been actually dissolved at that date, yet the dissolution did not put an end to the plaintiff's right to his share in the property and the profits of the partnership. In a case in which both parties, in their pleadings, assumed the partnership to have been dissolved, this Court, speaking by Mr. Justice Miller, held that drunkenness and dishonesty on the part of one partner and his consequent exclusion from the business did not authorize his copartner, 'of his own motion, to treat the partnership as ended and to take himself all the benefits of their joint labors and joint property,' or exempt him from responsibility to account to the excluded partner (*Ambler vs. Whipple*, 20 Wall., 546, 555, 557). And in a later case, the Court, speaking by Mr. Justice Woods, said : ' However the question may be decided, whether one partner may by his own mere will dissolve a partnership formed for a definite purpose or

period, it is clear that upon such a dissolution one partner cannot appropriate to himself all the partnership assets, or turn over the share of his partner to another with whom he proposes to form a new partnership' (*Pearce vs. Ham*, 113 U. S., 585, 593)."

It must be conceded that the rulings of this Court in *Karrick vs. Hannaman* and in the preceding cases of *Ambler vs. Whipple* and *Pearce vs. Ham*, referred to in the above quotation, conclusively settle the right of McMullen to compel Hoffman's estate to account for one-half of the profits earned under the contract with the City of Portland.

Aside from the letters of Hoffman there is nothing in the case to countenance his claim that an occasion really existed for the call on McMullen to furnish \$10,000 to meet expenses under the contract. On the contrary, there is some ground for saying that Hoffman was seeking a pretext for getting rid of McMullen altogether.

Certainly the conditions were favorable for the successful working of such a plan. Hoffman lived in Portland and had exclusive charge of the work, as had been arranged between him and McMullen, who lived and was engaged in business in San Francisco, and was, therefore, completely dependent on Hoffman for information as to the state of their joint business in Portland.

Hoffman having, for his own gain, turned State's evidence against McMullen, by setting up the defence of illegality, it is not perceived that he is on a better footing, as to credibility, than any other accomplice who betrays his confederate for an advantage to himself. "The acknowledged turpitude of the witness," says Mr. Starkie, "must necessarily stamp his testimony with suspicion."

But these letters of Hoffman's, so much relied on by re-

spondent, are only evidence in so far forth as they explain the meaning of McMullen's letters in reply to them, and no farther.

As has been fully shown in our original brief, (pp. 213, 214,) there was no foundation in fact for the urgent demands made by Hoffman on McMullen for money to meet the September expenses ; and as those demands occurred at a time when the business of the whole country was almost paralyzed by a financial panic, the inference is that their object was, we repeat, to force McMullen out of the partnership, by requiring of him what was an impossibility, under existing conditions.

As it was the admitted understanding between McMullen and Hoffman that the latter should carry on the work on the contract, and as the record shows, beyond question, that the monthly payments made by the City to Hoffman for September, 1893, and each succeeding month were sufficient to meet all the expenses of the work up to date and leave a handsome balance in Hoffman's hands after each payment, it is difficult to understand on what ground it is charged that McMullen was slack in performing his duty under the partnership articles. It will not be denied that McMullen furnished an important part of the plant necessary to the execution of the contract, and the record fails to show any pretext for putting an end to the partnership except McMullen's failure to respond to the unreasonable and unjustifiable demand for \$10,000, in September, 1893. If before that date McMullen was remiss, Hoffman had unquestionably condoned his conduct.

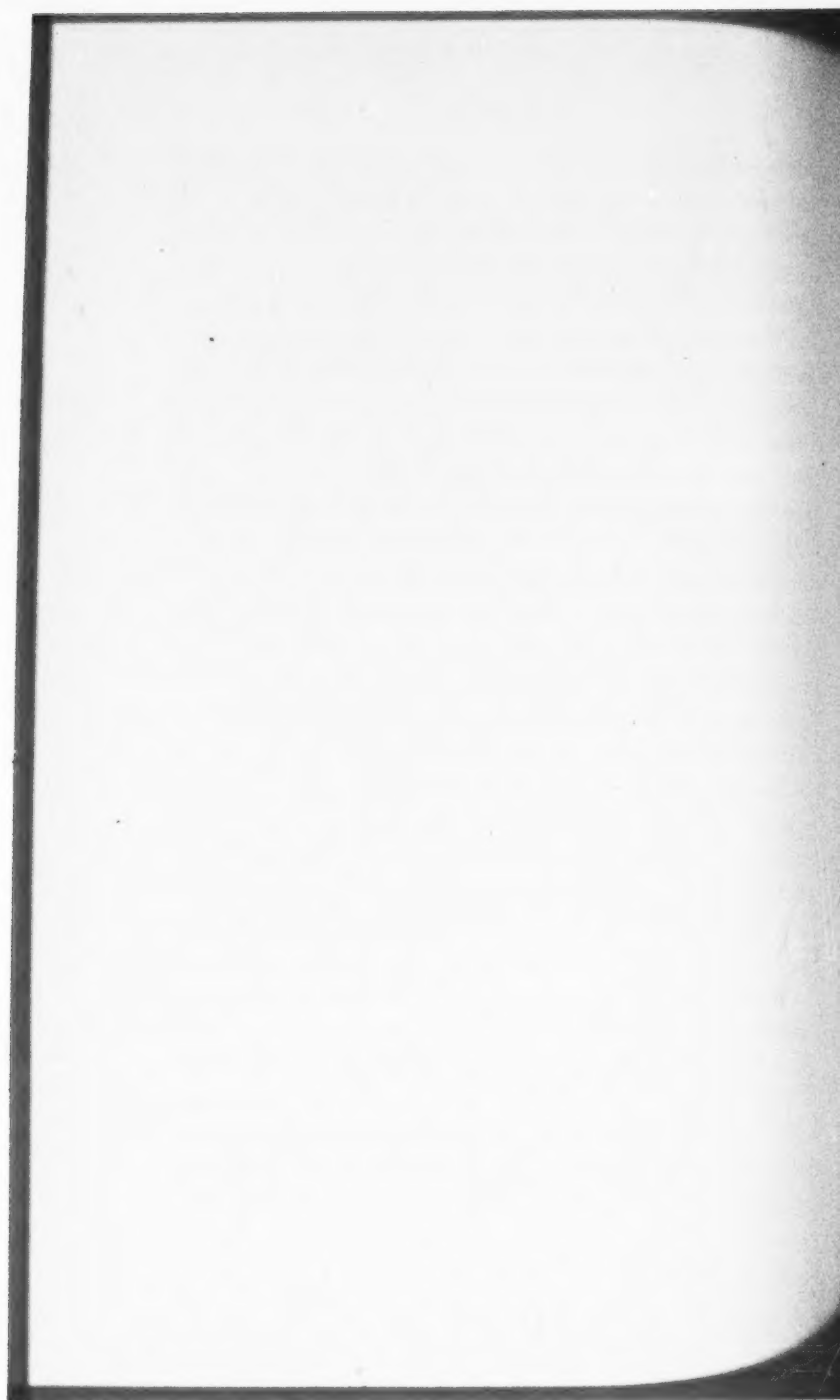
Without wasting words upon the untenable proposition that McMullen acquiesced in Hoffman's effort to exclude him

from the firm, that being immaterial to the case, it may be said without fear of contradiction that there is nothing in the record to show that McMullen was guilty of the folly of renouncing his right to bring Hoffman to an accounting as trustee for all the profits earned under the contract.

To say that Hoffman was liable for profits up to the time of the so-styled dissolution, and no further, seems extreme, for why should McMullen be debarred from sharing the profits thereafter earned on the contract which he had done so much to obtain and of which he was half owner? Counsel are prudently silent with reference to this effort at spoliation on Hoffman's part, which, as viewed from this standpoint, must be condemned both at law and in equity. Clearly there is nothing short of the bar of the statute of limitations that could, under any imaginable circumstances, prevent McMullen from maintaining a bill for an account and for relief against Hoffman, treating him as a constructive trustee.

WM. A. MAURY,
L. B. COX,
Of Counsel for Petitioner.

WASHINGTON, D. C., 1505 Pennsylvania Avenue.



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No. 622 271.

Brief of Mallory for Respondent
IN THE

Supreme Court of the United States.

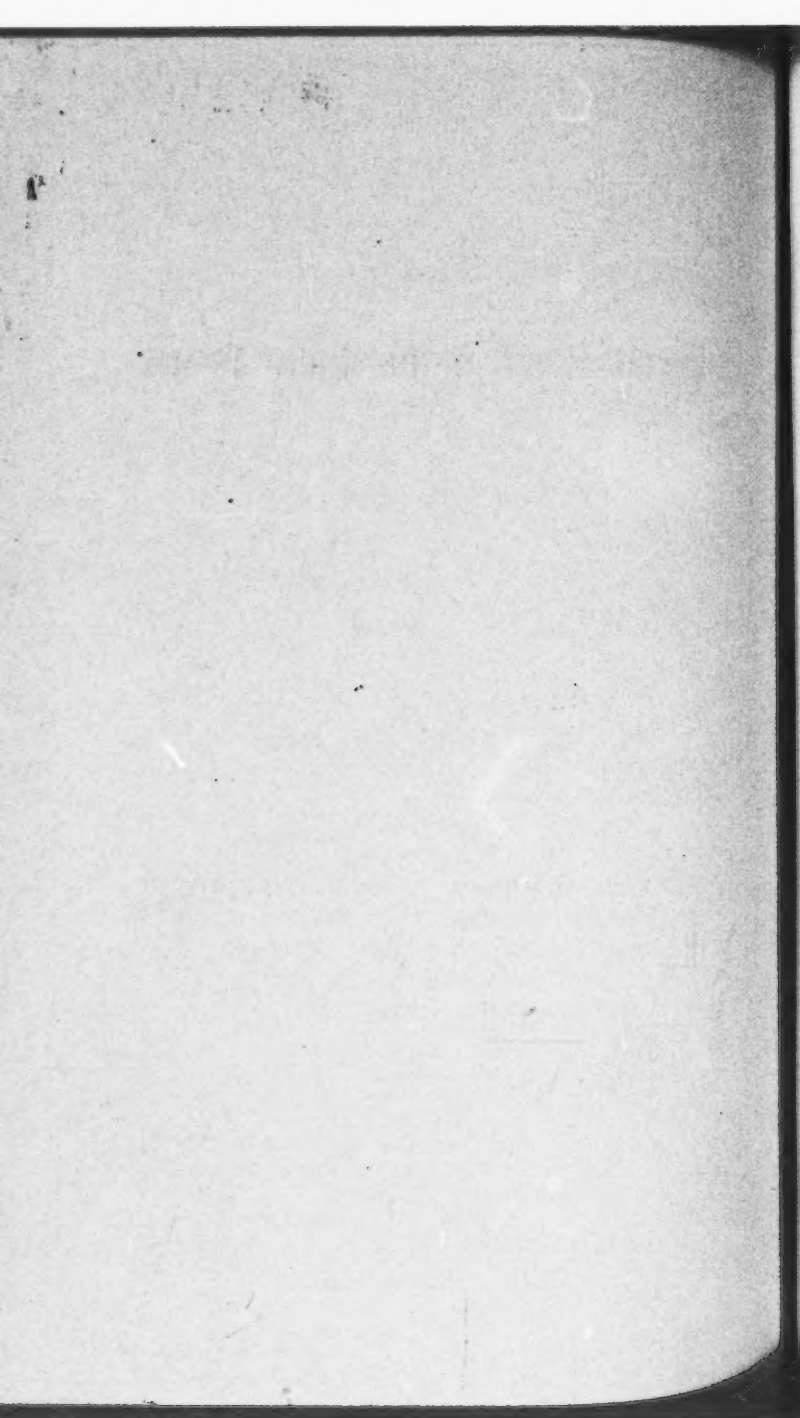
Filed April 26, 1898.

OCTOBER TERM, 1897.

JOHN McMULLEN,	<i>Petitioner,</i>	} No. 622.
<i>v.</i>		
JULIA E. HOFFMAN, Executrix of		
the last will of LEE HOFFMAN,		
deceased,	<i>Respondent.</i>	

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR
THE NINTH CIRCUIT.

DOLPH, MALLORY & SIMON,
Attorneys for Respondent.



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JULIA E. HOFFMAN, Executrix of			
the last will of LEE HOFFMAN,			
deceased,	<i>Respondent.</i>		

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF *CERTIORARI*
TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR
THE NINTH CIRCUIT.**

The first question for consideration is whether the petition, as a whole, presents a case of such gravity and importance as to require or justify this court under the rules which govern its action in such cases to bring the record of the Circuit Court of Appeals here for

review. In *Law On Ben*, Petitioner, 141 U. S. 583-587, it is said "that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instruction; and it is only when such questions are involved that the power of this court to require a case in which the judgment or decree of the Court of Appeals is made final, to be certified, can properly be invoked."

The petition and record filed here show the controversy to be between citizens of different states, and this difference of citizenship is the basis of jurisdiction; hence, but for the reservation in the act creating the Circuit Court of Appeals, of the right of this court to issue as writs of *certiorari*, the judgment of that court would have been absolutely final.

The object of the suit is to compel one of the parties to pay money to the other. The simple fact of the payment or non-payment of the money sued for, the general public has no other concern with than that, since application is made to the court, the public is interested in seeing that in its courts justice is administered according to law. Before the courts can determine what law must be the guide by which justice is to be administered, it must be in possession of the facts to which the law is to be applied. The petition in this case, and the record accompanying it, set out a state of facts to which the Court of Appeals applied a rule of law which they regarded as the correct rule of decision under to the facts proved. But the petitioner declares that these findings of the Circuit Court of Appeals are contrary to the evidence; that a different state of facts was actually established by the proof, and that to such facts the court should have applied a different rule of law.

In *Columbus Watch Co. v. Robbins*, 148 U. S. 266, this court say in effect, at page 270, that the fact that the Circuit Court of Appeals for one circuit has rendered a different judgment from that of another Circuit Court of Appeals for another *under the same conditions*, might furnish grounds for a *certiorari* on proper appli-

cation. It is further stated that this difference can only exist where the courts have actually reached contradictory results. It goes without saying that these results must be based upon the same conditions, which means the same or similar facts. From the petition in this case, it appears that the facts upon which the Circuit Court of Appeals based its decision were different from those found by the court and it is now sought to have this court bring up the record of the Circuit Court of Appeals, and find, if it can, that that court erred in its findings of fact, and to such facts applied the wrong rule of decision, that this court may correct the error. It seems safe to assume that this court will not issue the writ of *certiorari* for any such purpose, but will accept the facts as found by the Court of Appeals as the correct statement of the conditions upon which its decision was based.

"This branch of our jurisprudence should be exercised sparingly, and with great caution."—141 U. S., *supra*.

It is submitted that the case made by the petition, viewed from the standpoint here taken, shows no grounds for the writ of *certiorari*, either from any interest the general public has in the questions presented, or for the purpose of avoiding confusion of decisions in federal courts upon questions showing the same conditions.

But the petition presents another feature, stating, in effect, that if the facts are as found by the court, which the petition denies, the Court of Appeals has applied to them a rule of decision different from, and contrary to, other decisions of this court upon the same conditions, and has thereby inaugurated a system of inharmony and confusion in our jurisprudence, and in support of the allegation cites certain cases which have been decided by this court as well as cases decided by courts of appeal in other circuits, which the Circuit Court of Appeals in the Ninth Circuit has refused to follow.

Among the cases cited which have been decided by this court are:

McBlain v. Gibbs, 17 How. 232.

Brooks v. Martin, 2 Wall. 70.

Planters' Bank v. Union Bank, 16 Wall. 438.

Railroad Co. v. Durant, 95 U. S. 576.

Armstrong v. Bank, 133 U. S. 434.

The important question to be first settled is to ascertain whether the "same conditions" prevailed in the cases cited as existed in the case of McMullen v. Hoffman, as they appeared before the Circuit Court of Appeal for the Ninth Circuit, in order to ascertain whether the latter court has refused to follow the rule laid down by the cases cited. A brief examination of these cases will be necessary to that end.

McBlain v. Gibbs, 17 How. 232.

The facts of this case, briefly stated, are: The "Baltimore company" had come into possession of certain money as the result of an illegal contract made in violation of the neutrality laws of the United States. One Goodwin owned a share in the company which, for a valuable consideration duly paid to him by one Oliver, assigned to Oliver his share and all his interest in said Baltimore company. Litigation afterward arose between the representatives of Goodwin and Oliver touching the validity of the assignment. It was sustained by the Court of Appeals of Maryland, and the fund distributed among the heirs of Oliver. Afterwards the assignee of Goodwin commenced another suit against the executors of Oliver to recover this fund. Oliver's executor pleaded the assignment to him by Goodwin. This Goodwin's assignee undertook to avoid by the claim that since the contract under which the fund sued for was acquired by the Baltimore company was illegal, Goodwin's assignment was illegal also, and therefore the assignment was void and could afford no defense to Oliver. This court held that the position of the assignee of Goodwin was not maintainable, and said, at pages 235, 236:

"The transaction, out of which the assignment to Oliver arose, was uninfected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him.

The assignment was subsequent, collateral to, and wholly independent of, the illegal transaction upon which the principal contract was founded. Oliver was not a party to the transactions, *nor in any way connected with them.*" The court proceeds thus: "It may be admitted that *even a subsequent collateral contract if made in aid and in furtherance of the execution of the one infected with illegality, partakes of its nature, and is equally in violation of law;* but that is not this case."

In its facts this case does not even resemble the case of McMullen v. Hoffman. The money which had been realized out of the illegal transaction had been paid over to third persons in no manner connected with or privy to the illegal transaction, and the suit is brought to recover it back. It does not appear that Oliver even knew that there was any taint of illegality in any part of the business. The court plainly intimates that if the assignment to Oliver was for the purpose of aiding in or carrying out the illegal contract, he could not have the protection of the court, but since he was wholly innocent of any wrong or color of wrong, or of any knowledge that any wrong had been done by others, the court held that the law invoked did not apply to him. How does the condition presented by these facts compare with the facts disclosed by this record, showing McMullen's relation to the fund here in controversy? Does this record show that McMullen was an innocent assignee of an interest in an illegal contract? What does he say about it? In his original bill McMullen alleges, Rec., Vol. 1, p. 5 (7), "that before the time named in said advertisement (advertisement for bids for the waterworks of the City of Portland) within which bids were to be received for the construction of said waterworks, *it was* agreed by and between the defendant and your orator that they would jointly endeavor to obtain the contract for the same or some part thereof, and that in their joint interest a bid should be put in for the construction of said waterworks, or for the construction of a portion thereof, and that in case they were success-

ful they would *share equally in such contract as resulted from their bid*; that pursuant to said agreement between the defendant and your orator, and in their joint interest, a bid was put in by the defendant in the firm name of Hoffman and Bates, under which name defendant was engaged in business, for the manufacture and laying of steel pipe from the head works of said system to Mount Tabor, which bid was found to be the lowest bid for said work, and the defendant was declared to be the lowest bidder and entitled to a contract with said City of Portland therefor; *and thereupon, in evidence of the interests had by the defendant and your orator in said bid and the contract with the water committee to be entered into thereon and the work to be done thereunder, on the 6th day of March, the defendant and your orator entered into a certain written agreement under their hands and seals that they would share equally in such contract as should be entered into between the defendant and the City of Portland touching the work covered by said bid, each of them, the defendant and your orator, to furnish and pay one-half of the expenses of executing said contract, and each to receive one-half of the profits, or bear one-half the losses which should result therefrom; and, further, that in case either party to said contract should get a contract for doing or should do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses of said contract or work should be shared and borne by the defendant and your orator equally.*"

The bill further alleges in substance, Rec., Vol. 1, p. 6 (8), that a contract was afterwards and on the 10th day of March, 1893, in the joint interest of himself and your orator, the defendant entered into a written agreement with the City of Portland, in the name of Hoffman and Bates, for the performance of the work required to be done under said bill. It is further alleged in said bill, Rec., Vol. 1, p. 7 (10), that your orator and the defendant entered upon the performance of said work immediately after said contract with the city was exe-

cuted, and completed the work of manufacturing and laying said pipe on January 1, 1895.

In his deposition, Rec., p. 171 (240), McMullen, the petitioner, says in substance:

"Whatever consultations I had with Hoffman relative to procuring the contract from the water committee was with a view to myself and he performing the work together in case we got the contract. I think whatever work I afterwards did in the way of manufacturing and laying the pipe was a result of my arrangement with Hoffman for procuring the contract in the first instance. Rec., Vol. 1, pp. 174, 175 (244-5-6). When Hoffman and myself were figuring upon a bid for manufacturing and laying the pipe in question, we had a verbal agreement together to be partners in the performance of the contract if it was awarded to us. We had a tacit understanding, as our correspondence will show. We bid for it (the work of manufacturing and laying the pipe) with the idea of getting the contract and doing it if we got it, Hoffman and I together, as partners. After the work had been awarded Hoffman and myself had our contract of partnership put in writing, stating such were the facts as the new condition of things had brought into existence. We couldn't have done it before."

This somewhat extended statement of the contents of the bill and the testimony of the petitioner has been made for the purpose of calling to the special attention of the court the fact that according to his own showing McMullen, the petitioner, had been by his own claim an equal partner with Hoffman in this entire business, from the first of their negotiations to secure the contract, and that the written agreement of copartnership upon which so much importance is placed was no more than a formal reducing to writing of an agreement that had existed in fact from the first.

The facts then, as shown in this case, are that Hoffman and McMullen entered into a partnership agreement to undertake to secure a contract with the City of Portland to manufacture and lay certain pipes for conducting water to the City of Port-

land. The contract was to be let by public letting upon sealed bids to the lowest bidder. If the contract was secured the work was to be done, and if profit was made it was to be divided between Hoffman and McMullen. This profit was the sole object for which the bids were put in, and the work done. The contract was secured, and the work performed. Hoffman actually did the work, and had received a portion of the pay therefor. He refused to account to McMullen, and McMullen sued for an accounting and a division of the profits resulting from the execution of the contract with the city.

On the trial the evidence disclosed the fact, as found by the Circuit Court of Appeals, that the contract which McMullen and Hoffman had with the city was procured by means that were illegal and fraudulent. The Circuit Court of Appeals found, as the petition herein states, pp. 8, 9, that a corrupt agreement had been entered into between petitioner and Hoffman to stifle or suppress competition in bidding for the work for which bids were invited by the City of Portland, of which the manufacturing and laying of pipes was a part.

That, in consideration of sharing in profits on work awarded upon the bid submitted, petitioner put in a fraudulent bid higher than he otherwise would have submitted. That the bid put in by petitioner was higher than that put in by Hoffman, for the same work, and that said higher bid was submitted with a fraudulent object, for the purpose of deceiving the water committee of the City of Portland, and that the fraud was in petitioner and Hoffman holding themselves out to said committee as rival bidders. That petitioner and Hoffman employed illegal means to obtain the award of said contract. That Hoffman never paid or agreed or promised to pay to McMullen any part or portion of the money received by him for the execution of said contract. From all these facts it seems as clear as any fact can well be proved that it was as much a part of the real partnership agreement, although omitted from the written paper, that the parties should practice the

fraud which the court has found was practiced in fact, as it was to execute any part of the work, if by means of the fraud the contract should be secured. A single quotation from a letter written by McMullen to Hoffman, and referred to by the judge who delivered the opinion of the Circuit Court of Appeals, will show the methods adopted by this partnership. The city's system of water works required the water to be conveyed underneath the Willamette river at Portland, and the part of the work for which bids were invited was for providing and laying these pipes. McMullen and Hoffman had an eye on this work and this is how they proposed to get it. McMullen writes:

"I do not want to let go of the submerged pipe; want to get the job. I think we can make \$25,000 on that job, but we must pool it. To do this we will have to let the secretary, Frank T. Dodge, in, and, if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened; and we will gather in everybody that is personally represented. Don't think there is many."

It is to this state of facts that counsel for petitioner claims the court erred in not applying the rule laid down by this court in *McBlain v. Gibbs*. The records of the two cases present conditions as unlike as could well be supposed.

In *McBlain v. Gibbs*, Oliver, the assignee of the share of Goodwin in the Baltimore company, had no other connection with the affairs of the company than that he had become the assignee of a share in it. This had been paid over to him, and the representatives of Goodwin sought to recover back.

In this case, a great fraud had been practiced by McMullen himself, and to secure the fruits of that fraud he is now before the court asking its aid. It is claimed that his own fraud in procuring the contract with the city was a completed transaction when the contract with the city was signed, and that the formal execution of a written agreement of copartnership between himself and Hoffman to execute the contract so fraudu-

lently obtained, inaugurated a new condition of things. That the contract of partnership operated as an equitable assignment of a half interest in the contract with the city procured through the agency of his own fraud, and in that way McMullen had not only purged himself of the fraud he had practiced, but the equitable assignment, resulting from the partnership agreement, was in effect equivalent to an actual delivery to him of the profits to be realized by the performance of the work, and that he is therefore in the same position in his relation to the contract with the city as Oliver was to the contract from which the money which had been paid to him had been obtained by the Baltimore company. This contention cannot be sound. The case of *McBlain v. Gibbs* is an authority directly against it. If it were conceded that the execution of the partnership agreement operated as an equitable assignment of a half interest in the contract with the city, it by no means operated as a delivery of the profits of that contract to the assignee. No profit had been earned, and such delivery was impossible. The most that can be claimed for it is that it operated as an assignment of an interest in the contract, but the assignee took it burdened with any illegality by which it was afflicted in the hands of the assignor.

The act which relieved the fund paid to Oliver of the illegality by which it was affected, was its actual payment to him as assignee, he being innocent of all connection with the illegal acts which tainted the fund in the hands of his assignor.

In *McBlain v. Gibbs*, the court say, at page 236:

"Oliver, by the assignment, became simply the owner in place of Goodwin, and as to any public policy or concern supposed to be involved in the *making* or in the *fulfillment* of such contracts, it was a matter of entire indifference to which it belonged. In consequence of the illegality, the contract was invalid, and incapable of being enforced in a court of justice."

The contention that what is claimed as an equitable assignment to McMullen by the execution of the con-

tract of partnership, operated as a delivery to him of his share of the profits, so as to make the rule in *McBlain v. Gibbs* applicable to him, seems absurd, and especially so when it appears, as it does in this case, that McMullen was himself one of the chief actors in practicing the fraud which made the contract, which it is claimed was assigned to him, illegal; and when it further appears that there never was a moment of time, either before or since the partnership contract was signed, that McMullen does not claim to have been an owner in his own right of a half interest in the contract with the city, so that the assignment, to which so much importance is attached, is no more nor less than a formal declaration of what was his already. Besides, if the pretended assignment was a delivery to him of the interest assigned as the fund was delivered to Oliver, what occasion has he to come into any court for aid or relief? Oliver was not suing to get his interest under the assignment. He had received it, and the suit was to recover it back.

It appears from the record in this case that the privilege of performing the work mentioned in the contract with the city was the sole aim and object of the bidding in the first instance, and it was through that means that profits were to be realized, and it was to secure these profits that the fraud was perpetrated, and the very work which the partnership, which it is claimed was created by the contract, set out in the record, was solely for the purpose of the "fulfillment" of the fraudulent contract which McMullen had himself been forward in securing. The right to manufacture and lay the pipe was the very thing the fraud was practiced to secure, and the act of doing the work was as much in "fulfillment" of the original scheme as was the act of putting in the fraudulent bids. It is said by counsel for the petitioner that the contract of partnership was legal and for a lawful purpose. It is not denied that a contract formed for the purpose of doing such work in a legitimate way is lawful and proper. So is bidding at public letting lawful and proper when lawfully and properly done; but

when such bidding is done for the purpose of defrauding the public or another, and through the agency of such fraud contracts are secured for the performance of which further action is required, combinations or partnerships entered into by the perpetrators of the fraud for the fulfillment of such contracts cannot be said to be legitimate or lawful.

The case of *Brooks v. Martin*, 2 Wall. 70, upon which counsel for petitioner seem chiefly to rely, though not, in its facts, identical in all respects with the facts in *McBlain v. Gibbs*, they nevertheless present a condition so unlike the case now before the court as to make the rule there laid down inapplicable here. In that case the only illegal act was the purchase of soldiers' scrip. The act was illegal only because the statute authorizing the scrip to be issued, and donating it to the soldiers, declared that its sale should be void. No penalty was attached, except that a purchaser could not defend his title, if occasion required. The provision was inserted in the act for the sole benefit of the soldier. The purchase of the scrip, had not its sale been forbidden, would have been legitimate business, and its purchase under the circumstances was not an act involving any element of moral turpitude. The risk was taken by the purchaser of losing his money. No element of public policy was involved in the act of purchasing the scrip. It was nevertheless an illegal transaction, because, if entered into, the law would not uphold it.

The facts as they appeared in that case were that such scrip was purchased, in considerable amounts, with money which Martin furnished, and was delivered to Brooks, the active member of the partnership. This purchase completed the illegal transaction. The title to the scrip, as against everybody but the soldier, was in the purchaser. Thus possessed of the property, Brooks proceeded, by legitimate steps, in no manner connected with or dependent upon or in execution of the illegal contract of purchase, to and did carry the scrip, and the proceeds of the sale of it, through step after step of lawful business transactions, until consid-

erable profits had been realized. He presented the scrip to the department at Washington, where the title was recognized in him, and warrants for the land to which the holder of the scrip was entitled were issued to him. These warrants were afterwards laid upon lands. The lands, many of them, were sold, money realized from the sale, and afterwards loaned on mortgages. Every step along the whole line after the purchase of the scrip was a legal and legitimate use of money in the hands of the partnership, and the profits sought in that case to be recovered were the result of, and had been realized from, these legitimate transactions, every one of which, as has been stated, was independent of and unaffected by and in no way in aid of the execution of the illegal contract. To this state of facts the court laid down the rule in *Brooks v. Martin*.

Now, counsel for petitioner say the Circuit Court of Appeals has committed a grave error because it has said that the rule properly and correctly applied in that case does not apply to the facts disclosed by the record in the case of *McMullen v. Hoffman*. It seems to me that an element in distinguishing the two cases which ought not to be lost sight of is that in the former the illegal act was illegal only because the sale of the scrip was forbidden, and in no way involving any public interest, while in the latter the fraud complained of reaches every interest of the nation, and of the states, and of municipalities, and of individuals, where any manner of improvement is to be made or any labor is to be done, and its price to be determined by competition through public lettings upon sealed bids. If the course shown to have been pursued in securing this contract can have the aid of the courts to uphold it, and the contracts so secured can be enforced, then the business of inviting competition by bidders at public lettings is the sheerest mockery, and becomes a most efficient agent to replace integrity by rascality and in the place of honesty install fraud.

Not a case is cited by counsel for petitioner growing out of or based upon a state of facts bearing any near

resemblance to the facts in the case of McMullen v. Hoffman. The cases cited by counsel are those only in which the illegality complained of was the violation of some statute, or some act of like nature.

The facts in the case of McMullen v. Hoffman are not without precedents involving the same principles, and the courts have laid down rules applicable to them. These rules do not in any manner conflict with any decision of any court of the United States upon the same conditions. It is this class of cases that the Circuit Court of Appeals understood as laying down the rule of decision in this case. These decisions were followed by the court of appeals, and led it to a conclusion adverse to the petitioner.

No attempt will be made by me to examine or comment upon these cases. The whole subject has been so carefully and ably presented in the opinion of the court of appeals by Justice Hawley, that further comment by me would be quite out of place, and this remark applies to all the criticisms of counsel upon the opinion. It is only needful for the purposes of this application to refer to the opinion itself for a complete answer to them.

The second paragraph of the petition presents a question not specially presented to the attention of the court of appeals at the hearing. The attention of the court was first directed to this question in the application for a rehearing where the subject was first discussed in counsel's brief.

The petition alleges "that if the decision of the Circuit Court of Appeals in this cause were correct with reference to the contract made by the City of Portland with Hoffman and Bates for manufacturing and laying pipe, for the reason assigned therefor, such reason affords no ground for refusing to award your petitioner his share of the profits made on other work performed by your petitioner and said Lee Hoffman, as co-partners, for the City of Portland, subsequently to said bidding and to the making of said contract, and entirely independent of them."

The special matters which it is claimed do not come

within the contract with the city, are, 1st, \$14,496.74 for extra work, not specified in the contract; 2d, a store, etc., from which \$15,339.76 was realized; 3d, a disputed claim against the city for \$16,961.25; 4th, other partnership assets which cost \$7,857.36. Petitioner alleges that the decree of the circuit court is erroneous in not allowing to petitioner his alleged share of these items.

A complete answer to this claim for the purposes of this proceeding is, that the question presented by it is not of such "gravity and importance" as to call for the interpositions of this court, through its writ of *certiorari*. If questions like this are to be brought here by the use of this writ, for the sole purpose of correcting some supposed errors of the court of appeals, instead of this court being relieved of a portion of its labors by the court of appeals, the result will be that every litigant defeated in that court will become a petitioner for this writ, and the labor of this court will be doubled instead of reduced. The reservation, to this court, in the act creating the court of appeals, of the right to issue this writ, was not designed for any such purpose. This court has declared that the writ should be "sparingly used, and only in cases of gravity and importance." This is not such a case. The case made by this allegation in the petition shows a design to convert this court into a court of appeal to correct errors alleged to have been committed, in matters of minor import, for the full understanding of which a careful and laborious examination of the facts of the case must be made, in order to ascertain whether an error has been committed.

The facts relating to the subject as they are to be gathered from the record will not support the allegations of the petition.

The contract for manufacturing and laying the pipes for the city water works was accompanied by specifications upon which the bidding was based, and the right was reserved by the city to make such alterations, deductions or additions thereto as in the opinion of the engineer in charge of the works for the city should direct, and

if in making such alterations, deductions or additions the expense of the work should be increased or diminished, the value of such increase or decrease should be added to or deducted from the price of the work. If additions were made not specifically pointed out in the contract, this was extra work, but it was such work as the contractor was bound to perform, although he was to receive for it extra compensation. Such is the character of that work for which the item of \$14,496.74 is allowed as extra work, and it is idle to pretend that this work was not as much a part of the work of manufacturing and laying the pipe as was the work specifically enumerated, and was equally within the contract, and was performed in pursuance of it. This appears to have been the view taken by the Circuit Court of Appeals. * It is such a matter which the petitioner by this proceeding seeks to have certified to this court for review. Of the same nature precisely is the disputed and disallowed claim of \$16,961.25. This demand is based upon the claim of Hoffman, that in performing the contract he had, in pursuance of its requirements, performed labor of the value named, and demanded compensation from the city, while the city, through its committee, claimed that the services so rendered, and the money so claimed to have been earned, was within the contract, and no extra compensation was due. It is true that it was stipulated that such a claim had been made, and it is equally true that if anything was due upon it, or any division could be made of it, some court must first find that it had been earned outside the original contract with the city. Will this court issue its writ of *certiorari* to bring here for review such a question?

And as to the matter of the plant on hand in the possession of Hoffman at the time of the completion of the work said to have cost \$7,857.36, the testimony in the case shows that this was a part of the appliances used in the completion of the contract and as much included in it as the pay for the labor of any man employed was a part of the expense of it. And all this

was a part of the means understood by the parties when they were figuring to get the contract; when they were contemplating and practicing fraud by which they obtained it, which must be employed to secure the profit which was the sole incentive to all their actions in the matter.

The item of \$15,339.36, profit derived from a store, boarding laborers, and other sources, is shown by the evidence to have been earned in the execution of the contract with the city. The establishment of a boarding house for the purpose of feeding the men employed in the work, and keeping along with the work as it progressed a supply of such goods as were needed by the employes while at work, was simply one of the instrumentalities for the successful, speedy and profitable execution of the contract, and, while this business was carried on the books as a specific item, it was so carried in the books relating to the work required for the performance of the contract, and was a part of it. Besides, if this business was not a legitimate element in the work to be done under the contract with the city, it was not within the terms of the contract of partnership. This partnership agreement included no business except such as should be required for executing some contract with the city relating to the business of bringing Bull Run water to Portland.

The language of the contract is: "And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or do any other part of the work let or to be let by said committee *for bringing Bull Run water to Portland*, the profits and losses thereof shall in the same manner be shared by the said parties equally, share and share alike."

It is not claimed that any other contract than that for manufacturing and laying the pipe in the execution of which all the profits referred to in the petition were earned, was even entered into, and nothing showing or tending to show that either the petitioner or Hoffman regarded the arrangement for boarding laborers or other work, and providing supplies for their convenient

use, as anything else than instrumentalities for the execution of the contract. This claim is plainly an afterthought, and falls far short of showing a case of such "gravity and importance" as will justify the issue of this writ.

The seventh paragraph of the petition alleges that there was error by the court of appeals in finding and determining that "the relief prayed for required the court to investigate" all the transactions found by the court to have been illegal and fraudulent, as a prerequisite to a determination in petitioner's favor."

An examination of the record will show that the averments of the answer fully set out and explained the circumstances under which the contract of the city with Hoffman and Bates was procured and the fraudulent conduct of the parties, by which its true character was presented. The petitioner filed exceptions to this matter in the circuit court, and presented the same reasons in support of them as are now here urged. The circuit court overruled the exceptions, and delivered a forcible and able opinion in support of its conclusions, which is in the record now before this court, to which attention is directed. Rec., Vol. 1, p. 58.

From this decision no appeal was taken, and it became the rule of the case for the taking of testimony upon which the case was tried and decided. If error was committed, which cannot be admitted, it would seem that it was cured by filing a replication and acquiescing in the decision, and petitioner ought not to be allowed to avail himself of it at this time as a basis for this proceeding.

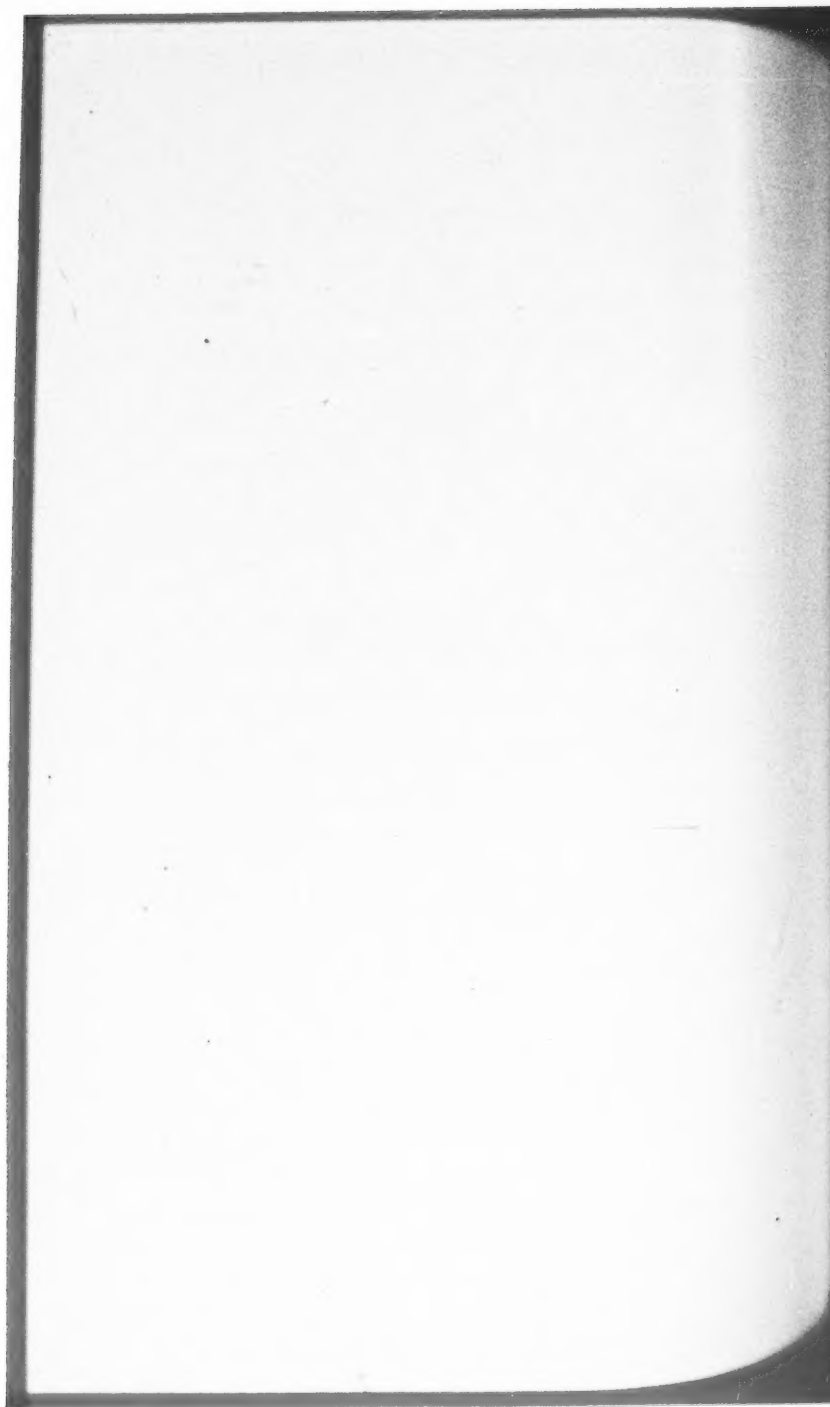
Besides, the subject had the attention of the Circuit Court of Appeals, and is discussed in the opinion rendered, where the authorities are cited. The reasons there presented against the contention of counsel are so clearly stated and the conclusion so abundantly supported that nothing more need be added.

It will be observed that the grounds upon which the petitioner chiefly relies for this proceeding are that if it be conceded that McMullen and Hoffman were guilty

of the frauds charged and found by the court to have been practiced in securing the contract with the city, and that a court of equity would not enforce such a contract on account of its illegality, nevertheless, in this case, after the parties to the fraud had, by the fraud, succeeded in placing themselves in a position where they might despoil the city, by executing the contract their fraud has secured, they could and did escape all the consequences of their rascality by converting themselves into a partnership, to do the work, the principal thing which, in their scheme, they knew must be done, in order to realize the benefits of their misconduct, and then say that this court in *Brooks v. Martin* has laid it down as a rule of law that by the trick of the partnership these parties purged themselves of their fraud and the contract of its illegality, so that a court of justice must lend its aid to enforce such contract, when but for the partnership it would not have done so. For an answer to this contention the court's attention is directed to the opinion in this case found on page 613 of Vol. 2, Rec.

It is respectfully submitted that this record shows no proper cause for the writ of certiorari to issue.

RUFUS MALLORY,
Attorney for Respondent.



No. 271.

CLERK OF THE COURT
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APR 4 1899

JAMES H. McKENNE

Brief of Mallory for Respondent

SUPREME COURT

Filed Apr. 4, 1899.

UNITED STATES.

OCTOBER TERM, 1898.

JOHN McMULLEN, *Petitioner,*

v.

JULIA E. HOFFMAN, Executrix of
the last will of LEE HOFFMAN,
deceased, *Respondent.*

No. 271.

Brief of Respondent.

RUFUS MALLORY,

Attorney for Respondent.

DOLPH, MALLORY, SIMON & GEARIN,

Of Counsel.

PORTLAND, OREGON:

F. W. BATES AND COMPANY, PRINTERS, 228 OAK STREET,
1899.

THE

...

Due service of the within
brief by the delivery of a duly
certified copy thereof, at
Portland, Oregon, on this 2
day of March, 1899, is here
admitted.

L. B. Cox.
of Attorneys for Petitioner

The source of the
proof of the delivery of a
certified copy thereof at
Portland, Oregon on the
day of March 1899
attested

Witness my hand
at Portland, Oregon

IN THE
SUPREME COURT
OF THE
UNITED STATES.

JOHN McMULLEN, *Complainant,*

v.

JULIA E. HOFFMAN, Executrix, of

LEE HOFFMAN, deceased,

Defendant.

STATEMENT.

The legislature of Oregon authorized the City of Portland to issue its bonds to raise funds for supplying the city with water, from a stream about thirty miles distant, called Bull Run river. The act authorizing the bonds provided

for the appointment of a committee of the citizens of Portland, known as the Water Committee, and gave to this committee entire charge of the proposed work; gave them authority to sell bonds, and exclusive control of the entire undertaking. The proposed work was divided by the committee into two sections; one from Bull Run river to Mount Tabor, a distance of about twenty-five miles, and the other from Mount Tabor to the city, about five miles. The five-mile section crosses the Willamette river. Works were required at the point where the water was to be taken from the river, and bridges were required in crossing streams, and in crossing the Willamette river the pipe is laid on the bottom of the river, and is referred to as the "submerged" pipe.

The committee was authorized to let this work to the lowest bidder upon sealed proposals. It was divided into several classes, thus:

Headworks.

Bridges.

Wrought-iron plates.

Manufacturing and laying steel plates.

Cast-iron conduit from Mount Tabor to Portland.

Submerged pipe.

In 1887 bids were invited for this work. At that time the San Francisco Bridge Company, a corporation organized under the laws of California, having its place of business at San Francisco, of which the plaintiff, John McMullen, was the principal stockholder and manager, was en-

gaged in contracting for work of this character. Lee Hoffman resided at Portland, and was engaged in like business, under the name of Hoffman & Bates. The San Francisco Bridge Company was a bidder at the letting in 1887, and was the lowest bidder on the item of manufacturing and laying the pipe from "head works" to "Mount Tabor," but the contract was not let, the act authorizing the bonds having been vetoed by the governor. Afterward an act passed authorizing the bonds, and it was known that the work would be done.

About 1891 an agreement was made between the San Francisco Bridge Company and Hoffman & Bates that they would unite in procuring a contract or contracts for doing this work, and would do whatever work they could secure contracts for; would each furnish half the money necessary to execute any contract they might secure, and bear equally the losses or share equally any profits which might result from the undertaking. In short, they formed a partnership, the object of which was to perform such work as they could secure contracts for when the same should be let by the Water Committee, to pay in equal proportion the expenses, bear equally the losses, and divide equally the profits resulting from doing any work. The Water Committee again invited bids for the work, to be presented on the 1st day of March, 1893. McMullen, in the name of the San Francisco Bridge Company, and Hoffman, in the name of Hoffman & Bates, were bidders at this letting, but instead of bidding in the joint name of the

San Francisco Bridge Company and Hoffman & Bates, in pursuance of their agreement, they kept the fact of their agreement and joint interest secret from the committee, and submitted bids severally, McMullen in the name of the San Francisco Bridge Company and Hoffman in the name of Hoffman & Bates, thus representing themselves as being competitors for the work bid for. When the bids were opened, on the 1st day of March, 1893, the bid of Hoffman & Bates was found to be the lowest for manufacturing and laying the pipe, and the contract for that work was awarded upon that bid. On the 6th day of March, 1893, McMullen and Hoffman reduced to writing so much of their original agreement as had not been executed in procuring the contract.

On the 10th day of March, 1893, a contract was entered into between the City of Portland by the Water Committee and Hoffman & Bates, in pursuance of the said bid, and the award made thereon.

The methods adopted by McMullen and Hoffman to procure contracts from the Water Committee will most clearly appear by the correspondence which passed between them before and after the contract of March 10 was signed, to which the attention of the court is called. The first letter in this correspondence is from McMullen to Hoffman, dated December 31, 1892 (R., p. 518). We quote the following:

"Mr. Lee Hoffman, etc.—Dear Sir: The Risdon Iron & Locomotive Works sent for me yesterday, and told me that if I had any pull, or had any friend in Portland who

had a pull, to get in and use it with the Portland Water Commission, as the Oregon Iron & Steel Company were trying to get the commission to adopt cast iron pipe for the Bull Run pipe line, claiming that they have a mine in Mexico from which they get a very superior ore, and that they could make cast iron pipe that would stand a tensile strain of 24,000 pounds to the square inch; while the best pipe-makers in the East claim 16,000 to 17,000 pounds to the square inch is the most that cast iron pipe will stand. If the Oregon Iron & Steel Company can prevail on the commission to adopt cast iron, it would virtually create a monopoly for them, as they are the only ones there who make cast iron pipe, and the Risdon people tell me that they can make it there in Oregon cheaper than one can import it from the East.

"As you are acquainted with the Water Commissioners, and have social and business relations with many of them, I think you are in position to counteract this movement; and if we are to make anything ultimately out of this job, it will be necessary to knock out this scheme. Get in and do what you can to beat it. I understand the Oregon Iron & Steel Company have a big pull in the commission. What you do must be done at once, as I understand they are to determine the matter at a meeting to be held next Tuesday."

The next letter in this correspondence is from Hoffman to McMullen, and is dated January 23, 1893 (Record, p. 562), and is to the effect that "the Bull Run pipe line will be let about March 1, and will be wrought iron most of the way. Committee will take bids on cast and wrought iron, but the cast pipe will have to be the standard sizes, and so I am satisfied the O. I. & S. Co. cannot get more than about eight miles. Now, Mac, this is a pretty large contract, and requires a good deal of capital, and I think we ought to put up some kind of a combination on it. I do not care to have this contract all alone, and I was thinking it would be a good plan if you, Risdon Iron Works, Wolff & Zwicker, and myself, would go in on it together and take the work. I am willing to go in with you alone on the contract; but both the Risdon and Wolff & Zwicker are strong teams, and I think if we would combine we

could take the contract and make more out of it than if any one went in for it by themselves. If you think favorably of this plan, you see the Risdon people and I will see Wolff. Let me know at your earliest convenience just how you feel about this. The only people I fear up here is Wolff & Z., and I think if we combine this way we would have a very strong team. . . . Now, Mac, I don't think we will be able to put up a pool on this work unless we could take in the O. I. & S. Co. (Oregon Iron & Steel Company), and I doubt it very much if they would come in. Of course, if we found out that we could put a pool up on it, each *one of us could go in separate.*"

To this letter McMullen replies, under date of January 26, 1893 (Record, p. 519), and, referring to the proposed combination, says:

"From correspondence that I have seen between the Risdon and Wolff & Zwicker, I am satisfied that they are pretty intimate, and that they will pull together in some form. Now I do not think that they will take us in, unless we convince them that we are going to make a hard bid for the work. Do not let them know that you do not want the job. I do not think that the Risdon wants so many partners in the contract. They might take Wolff & Zwicker in, but I do not think they would take you and us in. I think that we could do better by making them buy us off. The Risdon is a large, wealthy, forehanded concern, and they will make a hard fight for this job. I think that *we bid so hard on the job before*, that if they think we are going after it on the same line again that they will be disposed to capitulate with us. I think you ought to make Wolff & Zwicker understand that you and I are together, and that we are going to hit the job hard; then, if they make satisfactory inducements, when the time comes we will quit. I am pretty close to the Risdon. Have been in several deals with them. We were in with them on the contract for furnishing the dredger and doing the dredging at Honolulu—about \$15,000 worth of work. They took me in because they could not very well get along without me; we had a half interest in the deal. If they think they can throw you and me overboard, they will do it in a minute, so I do not think we ought to talk

partnership at all; on the contrary, talk 'get the job.' Then, if they are afraid of us, they will buy us off. Of course there may be so many bidding on it that it would not be worth while buying off one unless they were going to buy them all off, but this will develop later. Perhaps the O. I. & S. Co. could be gotten out of the way by giving them the cast-iron work, as I do not think the Risdon could compete with them on that portion of the work. Yet the O. I. & S. Co. might get a better price for that portion of the work if the Risdon and us should agree to let them alone on it, on the condition that they let the wrought-iron part of it alone."

Under date of January 30, 1893, Hoffman replies to McMullen's letter of the 26th, and says:

"Dear Sir: Yours of the 26th at hand and note what you say about the Risdon people not wanting too many partners. I have been talking with Wolff in an offhand way, telling him that I thought it would be a good scheme if such a combination could be made, but I think W. & Z. and the Risdon people have some kind of a deal, so I did not say much. As you say, we must do some rustling in the East if we want this work. Now my idea is to get this iron punched and planed in the East, so that all we would have to do here would be to roll it when it came; that would save a lot of machinery, and I think it could be planed and punched cheaper in the East than here. I will enclose you a list of what it will take, and the strength required. This will have to be iron (not steel) and I think if you can give this to Mr. Catt and if he has got the time to look after it, he could give it to some iron broker, and let him get us good prices, and we ought to get this work, or at least part of it. I will go out over the line as soon as the weather settles a little.

"The specifications are not yet out, but expect to get them tomorrow, and will mail you a copy. The committee estimates that it will take two and a half million dollars to complete the entire work. We would not have to bid on all if we did not wish to. About Wolff & Zwicker's financial ability—they can get all the backing they want, and their credit is very good.

"I don't hardly think I will be in San Francisco until

after the contract is let. Why could not Geo. W. Gibbs give good prices on the plates? He knows all the plate mills and ought to do the work on a very small per cent. on such an order as this would be. Think it might pay to see him."

Hoffman writes to McMullen again, under date of February 3, 1893 (Record, p. 565):

"Dear Sir: I left an order with Col. Smith today to mail you five copies of specifications, as per your telegram. He expects to get them from the printers so that he can mail them to you this P. M., or tomorrow sure.

"You will see that the work is all split up, so I don't think it is as good for us if it had been all let in one job. I will do what I can to get prices on the iron, and when you come up *we* will make up *our* mind what to bid on. *We* ought to get a part of this work anyway.

"The O. I. & S. Co. will bid on the entire contract, unless we could get them off as you suggested. Anyway, the time is short, and *we* will have to rustle hard to get in shape to make a good bid."

McMullen to Hoffman, February 6, 1893 (Record, p. 521):

"Dear Sir: Please send the strain sheets and blue prints of the plans of the bridges, including profile; also blue prints of the ball joints and any other plans for the pipe line that you may have. I have sent three copies of the specifications to Mr. Catt, and instructed him to get the cost of plant for manufacturing pipe, and also the cost of manufacturing pipe, together with the cost of lap-welded pipe for the submerged portion; also cost of ball joints.

"I will probably be up there about the 25th of the month, at which time I will have a report from Mr. Catt on these things. *I also have the old estimate, very full and complete*, that we made five years ago, when the work was offered before. As I said before, I think the important thing is to make Wolff & Zwicker think we are going to hit the job hard; then they will tell the Risdon; then we will see what *we* can do when *we* get there. . . . Also please send Mr. Catt, room 183 World building, New York

City, copies of all the blue prints mentioned, or that they may have, illustrating the work."

Hoffman to McMullen, February 8, 1893 (Record, p. 565):

"John McMullen, Esq.—

"Dear Sir: I herewith send you strain diagrams on file for the bridges, profiles of the crossings, and details of the and profiles of the bridges. The general plans I cannot get now, but expect to have them tomorrow and will then mail them to you. The engineer has changed his mind on the steel question, and has concluded to ask for bids on steel also, but iron will be preferable, all things being equal, and instead of having one pipe 33 in. diameter for the submerged pipe, two 26-in. pipes will be preferred. I will advise Mr. Catt about this."

McMullen writes Hoffman, under date of February 8, 1893 (Record p. 522.)

"Mr. Lee Hoffman—

"Dear Sir: We have schemed and figured a great deal the last three or four days on the Bull Run pipe line, and we are getting enamored of the job, *and I think the way to make some money on this proposition is to do the work.* There is nothing in furnishing the iron, as undoubtedly the iron men will bid direct as per specifications, and I suppose we will have to give the Oregon Iron and Steel Company the cast iron.

"We understand it is settled that the cast-iron pipe will be built from Mt. Tabor to the city reservoir—5½ miles—and that the other 24 miles from the head gate to Tabor will be of wrought-iron pipe. Write me if this is correct. Although they take bids for cast iron, too, for that later. I figured it up roughly, and I think that the cast-iron pipe on this latter would cost about \$400,000 more than wrought iron, and that on the other piece, from Mt. Tabor to the city reservoir, will cost about \$100,000 more than it would if they did it in wrought iron; and as it is no better I think this is quite a gift that the water committee will be making to the Oregon Iron and Steel Company.

"We will have to make the Oregon Iron and Steel Com-

pany know, when the time comes, that if they *do not quit and let go on everything except the cast iron* that we will hit them hard on the cast iron, and make it rocky for them, as I understand from interviewing cast-iron pipe men, who have agents here, that they can put that cast iron down in Portland *cheaper* than Portland men can make it, and better, too. I shall have some figures from the McNeal Pipe Foundry, one of the largest pipe manufactories in America; their representative was in the other day. I have made very full inquiries in the East, and Mr. Catt is going to devote his entire time next week to getting prices on cast and wrought-iron pipe, and the cost of plant and equipment for doing the work, and other matters relative to the job. I want you to make very full and thorough investigation, too, and then we will compare notes. I do not think it will take much money to run that job; think perhaps the plant, including building, is worth somewhere from \$25,000 to \$40,000, but this practically all the investment ~~it~~ we would need to have, as they are to pay 90 per cent. every month, and that ought to pay all bills; only thing would be to see that the estimates are kept full, which I do not think would be any trouble in doing with old man Smith. I think you ought to ascertain (offhand and without apparently caring to know) just what the Oregon Iron and Steel Company do want in the job, and whether they will be satisfied with the cast iron or not, and how far you think the committee would go to favor them. If the wrong man should be the low bidder, do you think they would re-advertise the job over again to knock him out? I expect you to know all about *this very important part of the business when I get there.*"

Under date of February 11, 1893, Hoffman writes McMullen:

"Dear Sir: Have mailed you under separate cover today general plans for the three bridges. I did not send these to Mr. Catt, as it is like pulling teeth to get prints, as they cannot make them fast enough. I sent him the strain diagrams, and I think that will be sufficient for him to get prices on, as I am sure the engineer will not be particular about details after a person gets the contract.

"Now, Mac, you are altogether mistaken if you think

the O. I. & S. Co. will not bid hard on the entire pipe line; they will be about as low as the wrought-iron men, if not lower. The committee will not pay any more for the 24 miles from Mt. Tabor to the head works for cast than they will for wrought iron, and I doubt it very much if they would take cast iron for that part at all. However, the O. I. & S. Co. have a big pull on the committee, and if they get down as low as the wrought iron they may be able to pull it through. Get the very best price you can on cast iron. I will try and get prices from the O. I. & S. Co. on pipe, and will then see and have a talk with them and find out what they want. This work will be let to the lowest bidder, no matter who is so long as he is responsible. *I, of course, think the bids can be manipulated some way that we could work on the commission after the bids are opened.* We are to work on the matter and will have our figures in shape by the time you get here.

"I think the parties that get the contract for manufacturing and laying the pipe ought to furnish the iron; still, there may not be much money in the furnishing."

The next letter in the correspondence is from McMullen to Hoffman, under date of February 13, 1893, and relates to matters of the size of cast-iron pipe, in which it is suggested as coming from an agent of one of the pipe foundries East, that the water committee, in order to serve the interests of the O. I. & S. Co., had fixed upon unusual and odd sizes for the cast-iron pipe, that is, sizes not made in Eastern foundries, so as to prevent competition by Eastern manufacturers with the O. I. & S. Co. The letter is found on pages 523, 524, 525, record, and is not copied here.

This ends the correspondence between the parties which took place prior to the letting of the contract on March 1, 1893. On March 8 (Record, p. 525), McMullen writes Hoffman.

Besides this correspondence the testimony taken in the case, and appearing in the record, shows some of the things actually done by McMullen and Hoffman in preparing the bids for the work to be done, and the character of their acts and their relations to the transaction. Refer-

ence is made to these transactions at this time, and in this order, for the purpose of placing before the court in the plainest and clearest method possible, the exact situation of the parties (Hoffman & McMullen) when this suit was begun.

The word "we," when used in the foregoing correspondence, refers to and means Lee Hoffman and John McMullen (Record, p. 165), (except when the word plainly refers to the San Francisco Bridge Company).

McMullen and Hoffman determined to operate together in procuring a contract or contracts for a part or all the work of constructing the water works from Bull Run river to Portland. They had much correspondence (see letters) and consultation. Mr. McMullen says (Record, p. 173), *while* Hoffman and himself were working together and preparing the bid for manufacturing and laying the pipe from head works to Mt. Tabor, he (McMullen) certainly had expectations of being partner in the work. That all the correspondence for three months prior to the time the bid was prepared will show that they had mutually agreed to be partners. McMullen says (Record, p. 171), whatever consultations he had with Hoffman relative to procuring the contract from the water committee, was with a view to himself and Hoffman performing the work together in case the contract was secured.

To the following questions, Mr. McMullen answered (Record, pp. 171-2):

Q. Whatever work you afterwards did in the way of manufacturing and laying the pipe was the result of your arrangement with Mr. Hoffman for procuring the contract in the first instance, was it not?

A. I think so.

Q. You and he made figures together for the purpose of bidding on this contract that was afterwards awarded to Hoffman & Bates, did you not?

A. We did.

Q. And the contract was awarded upon the bid prepared by yourself and Mr. Hoffman?

A. I think so; that is correct.

Q. Don't you know so?

A. Yes; I think I know it is so; if you will read the question again I will make it a little more explicit.

(The question is read.)

A. Yes; I know it is so.

(Record, p. 173.)

Q. Then I understand that while you and Mr. Hoffman were figuring together and preparing the bid for manufacturing and laying that pipe, you expected to be partners in executing the work, if you got it, if it was awarded on that bid?

A. Yes, that is correct; not only expected to be, but we had agreed to be.

(Record, p. 174.)

Q. . . . I want to know whether the substance, the general substance and purport, of that agreement (agreement marked plaintiff's Exhibit 1, hereafter to be described), had been understood between you and Mr. Hoffman prior to the time that that contract was awarded to Hoffman & Bates by the City Water Committee?

A. Well, I think I have certainly tried to make the matter clear.

Q. Let the examiner read the last question.

(Question read to witness.)

A. The general substance and purport—is that the language of the question?

Q. Yes.

A. Had been agreed upon—the purpose had been agreed upon? Well, it was agreed before the award had been made that we were to be partners. Now, after the award was made, this paper, Exhibit No. 1, is the identical

agreement that we mutually assented to. It was reduced to writing in Mr. Hoffman's attorney's office, and we both signed it. . . .

(Record, pp. 174, 175.)

Q. Let me put it in this form: When you and Mr. Hoffman were figuring upon a bid for manufacturing and laying the pipe for the Bull Run water works, did you not have an agreement together to be partners in the performance of the contract if it was awarded to you?

A. We had a verbal agreement.

Q. That is what I am asking.

A. A tacit understanding, as our correspondence will show better than anything else.

Q. Well, I am asking the question: Then it was with that idea in view that you and he bid together for the work, was it not?

A. We bid for it with the idea of getting the contract, and doing it if we got it.

Q. You and he together?

A. That is right.

Q. As partners?

A. That is right.

Referring to the same matter and for the purpose of showing the nature of the interest claimed by McMullen in the contract entered into by the water committee with Hoffman & Bates, hereafter to be described, the plaintiff, John McMullen, makes the following allegation in his bill of complaint (Record, p. 5):

"Your orator complains and alleges that prior to the 6th day of March, 1893, the City of Portland, a body corporate and existing by and under the laws of said State of Oregon, acting by and through its water committee, published advertisements inviting bids for the construction of a system of water works for said city, or for the construction of certain portions thereof, whereby water was to be brought from a certain stream, called Bull Run,

in the Cascade mountains, to said City of Portland, and there distributed for use; that before the time named in said advertisement within which bids were to be received for the construction of said water works, it was agreed by and between the defendant and your orator that they would jointly endeavor to obtain the contract for the same or some part thereof, and that in their joint interest a bid should be put in for the construction of said water works, or for the construction of portions thereof, and that in case they were successful they would share equally in such contract as resulted from their bid; that, pursuant to said agreement between the defendant and your orator, and in their joint interest, a bid was put in by the defendant in the firm name of Hoffman & Bates, under which name the defendant was engaged in business, for the manufacture and laying of steel pipe from the head works of said system to Mt. Tabor, which bid was found to be the lowest bid for said work, and the defendant was declared the successful bidder, and entitled to a contract with the City of Portland therefor. And thereupon in evidence of the interests had by the defendant and your orator in said bid and the contract of the water committee to be entered into thereon, and the work to be done thereunder, on the 6th day of March, the defendant and your orator entered into a certain written agreement, under their hands and seals, that they would share equally in such contract as should be entered into between the defendant and the City of Portland, touching the work covered by said bid, each of them, the defendant and your orator, to pay one-half of the expense of executing said contract, and each to receive one-half the profits or bear and pay one-half the losses which should result therefrom; and, further, that in case either party to said contract should get a contract for doing, or should do, any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses of said contract or work should be shared and borne by the defendant and your orator equally."

Mr. McMullen also says (Record, p. 221):

"The matter of joint action between myself and Mr. Hoffman, in regard to the water works of the City of Port-

land, under consideration, first came up several years before this job was awarded, when bids for building the Bull Run pipe line were taken in 1887, *after we were the lowest bidders*. At that letting Mr. Hoffman came to me and congratulated me, and said that we made a bold good bid, and that he did not think we knew so much about pipe lines, and said he was sorry that it was not going to go through; I think it was Governor Pennoyer that vetoed the bonds. He said: 'When this thing comes up again, Mac, we must go in together and see if we can get it,' and we frequently talked during the time that intervened between that occasion and December, 1892, when again negotiations were actively commenced, and it was understood the water committee were going to let the contract early in the spring."

Referring to the submerged pipe (Record, p. 212), Mr. McMullen says: "That was one of the sections of the work advertised by the water committee at the time that we secured the contract for the manufacturing and laying of the pipe. We had figured with a view to bidding together on that as well as the other."

This question was asked Mr. McMullen:

Q. That (meaning the submerged pipe) was included as much as anything else between you in the partnership, for all that was said between you on that subject, prior to the execution of the contract (Exhibit No. 1)? ?

A. Whatever was done prior to the partnership agreement, it was in the same condition as the job was secured; the submerged pipe, in our negotiations with each other, was in the same status as that relating to the pipe lines proper. We were interested together in the bid that was submitted (for submerged pipe). . . . (Record, p. 213): There was a bid submitted by Mr. Hoffman in which we were jointly interested. Submerged pipe was not let at the letting in March, 1893. There was a second letting.

Mr. McMullen says (Record, p. 214): “. . . I don't think I was in Portland at the time of the second letting. I think I furnished Mr. Hoffman what data and information I had relative to it, and I relied on him to put in the bid.”

‘In this connection it will be proper and necessary to a proper understanding of the facts as they existed, in connection with this business at the time this suit was begun, and in order to show the motives which moved the parties in procuring contracts for work from the water committee, to quote a passage or two from a letter written by McMullen to Hoffman, under date of August 4, 1893 (Record, pp. 577-8):

“I do not want to let go of that submerged pipe; want to get the job. I think we can make \$25,000 on that job, but we must pool it. To do this we will have to let the secretary, Frank T. Dodge, in, and if any bids come without personal representatives have him not receive them until after the letting, and then return them unopened, and we will gather in everybody that is personally represented; don't think there is many. Riffle has applied to MacNeil's agent here for bids on the cast iron, but we can control MacNeil's man here; he wants to work with us; his price will be about \$32 a ton, and freight and insurance, primage and use of money, etc., which will amount to about \$12 a ton, and which will make it about \$44 a ton.

“I enclose you a rough approximate estimate, which our Mr. Wood has made, which shows that the wrought-iron pipe is not in it at all; that it will cost \$20,000 more than the other.

“Another thing, Lee; I want you to see Smith & Watson, and see that they do not form any combination with any one else to bid on this work; take them in by giving them the cast iron, and hold them down to about what it is worth.

“The estimate we send you is made offhand, and is rough and only approximate.

“I think you can arrange to get Dodge into our camp.”

For the purpose of showing the circumstances under

which the bids hereafter to be mentioned were prepared and submitted to the water committee, and also the understanding and agreement between McMullen and Hoffman in regard to them, reference is here made to the testimony of Harry Dean Bush, engineer, employed by Hoffman, and who had charge of and prepared the bid for manufacturing and laying the pipe upon which the contract was awarded, and who was present and heard the arrangements made between McMullen and Hoffman in regard to the bidding and the manner it was conducted, and the object of submitting so many bids.

(Record, p. 264), H. D. Bush says Mr. Hoffman had been away to San Francisco and McMullen returned to Portland with him (this was a few days prior to the 1st of March, 1893). Hoffman informed Bush that McMullen and Hoffman were going to bid together on the work. McMullen brought many figures and estimates.

(Record, p. 266), Mr. Bush says: "They, McMullen and Hoffman, had various conversations about the bidding; that they would bid together so as to try to get as much of the work as possible, and it was decided finally that Hoffman & Bates' bid should be the lowest or lower than the San Francisco Bridge Company's bid for the manufacturing and laying of the pipe, and the San Francisco Bridge Company's bid should be lower than Hoffman & Bates' bid for furnishing the plates, so that there might be a chance to combine those two bids on both those two items."

(Record, p. 267), Mr. Bush says: "There were a great many conversations in my presence, the general idea being that each would bid on his own account, and they would share in whatever portions of the work they might be successful in getting; as I before stated, Hoffman & Bates' bid should be lower for the manufacturing and laying, and the San Francisco Bridge Company's bid should be lower

on the delivery of the plates; that was the day the bids should be opened; that combination they were making to get as much work as possible."

(Record, p. 268): "By combining Lee Hoffman's bid on the manufacturing and laying with the San Francisco Bridge Company's bid on the delivery of the plates, or if there was no bid between this combination—the Hoffman & Bates' bid on the manufacturing and laying and the S. F. B. Co.'s bid on the delivery of the plates—the S. F. B. Co. was to try to withdraw their bid on the delivery of the plates so that the whole work should go to Hoffman & Bates.

"Hoffman and McMullen agreed in a general way that a bid by the S. F. B. Co. should be put in for the manufacturing and laying, which should be higher than the bid by Hoffman & Bates for the same work. It was understood between them that this should so be done. Hoffman saw the bid prepared and put in by McMullen. McMullen showed it to him. McMullen brought with him to Portland an estimate upon this work, prepared by Mr. Catt, his engineer, which was all ready to be submitted as a bid. It required no other or additional figures to prepare it as a bid. Mr. Catt's estimate of the cost of manufacturing and laying was \$416,638. Mr. McMullen said he regarded this as a perfectly safe bid; that Catt had gone over it thoroughly.

(Record, p. 269): "The reason he did not put this bid in was because they thought they could get more money out of the job. The bid was raised at Hoffman's instance. The bid agreed upon between Hoffman and McMullen which Hoffman & Bates was to put in for the plates was \$359,378 80; S. F. B. Co.'s bid for the same was \$348,781."

(Record, p. 300). Mr. Bush says: "The figures in McMullen's bid for manufacturing and laying were not particularly agreed upon by anybody. It was agreed that it

should be a high bid, and it was simply filled in to make it high. It was not agreed upon to be any particular amount. The bid for the steel plates that was agreed upon, and was to be lower than Hoffman's bid, that was agreed to between Hoffman and McMullen. It was agreed that the San Francisco Bridge Company's bid for the bridges should be lower. The other things did not amount to much."

It appears from the testimony of McMullen (Record, pp. 175-6), that beside the bid that McMullen and Hoffman had jointly agreed upon, for manufacturing and laying the pipe, which was to be presented to the water committee in the name of Hoffman & Bates, another bid had been prepared for the same work which was to be placed before the committee in the name of the San Francisco Bridge Company. That both Hoffman and McMullen saw and knew the contents of this bid; knew it was higher than that put in the name of Hoffman & Bates; that the bid was put in either by McMullen or by his direction, and was accompanied with a certified check for five per cent. of the amount bid, as was required of all bona fide bidders (\$25,733.20).

Both Hoffman and McMullen knew that the bid put in or caused to be put in by McMullen, in the name of the San Francisco Bridge Company, was not a competing bid, and neither had any expectation that the contract would be awarded on that bid.

Mr. McMullen says (Record, p. 221), confirming a question put by counsel for defendant: "It is a fact that Mr. Hoffman knew when he put in this bid in the name of Hoffman & Bates that McMullen was to put in one in the name of the San Francisco Bridge Company, and that the bid so put in by him (McM.) would not be a competing bid to the one McMullen and Hoffman had agreed upon."

The reason the bid in the name of the San Francisco Bridge Company was put in is stated by McMullen on

pages 180, 219, 220, 221, 229, in substance to be, because the other bidders and the water committee knew that the San Francisco Bridge Company's representative was in the city and had been figuring on the work, and it was to keep the name of the company before the public as a bidder, and not with any idea of competing for the work bid for, that the bid was put in. In other words, the bid was put in for appearance sake.

The water committee had no knowledge, at the time the bids were opened, that Hoffman and McMullen were bidding jointly on the manufacturing and laying of the pipe, or upon any part of the work, but all bids were supposed to be *bona fide*, and were so considered and treated by the committee.

Isaac Smith, engineer of the water committee, says (Record, p. 240), he had no knowledge or information whatever at the time the bids were received, on the 1st of March, 1893, of any agreement of Hoffman and McMullen as to their interest in the bid; that he had no means of knowing that the bid of the San Francisco Bridge Company, by John McMullen, was ~~not~~ put in for any purpose than in good faith; had no knowledge whatever beyond the written bid which was submitted to the committee; had no conversation or understanding with any contractor. In response to the question: "How was that bid (San Francisco Bridge Company's) regarded by the committee as to other bids that were presented there being presented in good faith?" Colonel Smith answers: "They were all accepted as presented in good faith. No exception was made to any bid at all, and the contract was let to the lowest bidder."

Mr. Henry Failing was chairman of the water committee, and he says (Record, p. 387) he had no knowledge or information at the time these bids were opened or prior thereto that Mr. Hoffman and Mr. McMullen were united

in this purpose to bid on this work; had no knowledge on the subject; never saw McMullen to know him until today, although thinks he may have seen his face. This question is put to Mr. Failing (Record, p. 387):

Q. The testimony in this case shows that there was before the committee a bid of Hoffman & Bates for manufacturing and laying the pipe of some \$465,000, and something over that; and another bid submitted by the San Francisco Bridge Company for \$514,000 and some odd dollars; and so there was also evidence that there were some five or six other bids; I will ask you if at that time you had any knowledge that the bid of the San Francisco Bridge Company, signed by McMullen, was a mere sham, simply put in for the sake of making a show?

A. No, sir.

Q. How was that bid with the others treated as being a bid in good faith?

(Record, p. 388). A. It was treated by the committee in the same way. The bids were referred to the chief engineer for compilation. They were all treated alike.

Mr. Failing says he had no knowledge that there was anything about this bid any different from the others. It must have been accompanied by a certified check or it would have been thrown out. Witness remembers of no bid being rejected on that account.

The foregoing statement represents the facts as they existed on the 1st day of March, 1893. On that day, in pursuance of notice duly given by the water committee, bids were received for the work to be done and material to be furnished, and the various sums to be charged therefor.

Following is a statement of the bids put in by Hoffman & Bates, and by the San Francisco Bridge Company:

(All the bids received by the committee are set out in full in the record, pp. 501, 502, 503, 504, 505, 506.)

Head Works—

San Francisco Br. Co.....	\$16,550
Hoffman & Bates	17,800

Bridges—

San Francisco B. Co.....	\$31,279.07
Hoffman & Bates	33,562.94

Steel Conduit from Headworks to Mt. Tabor—

San Francisco B. Co.....	\$348,781
Hoffman & Bates	359,278

Conduit from Headworks to Mt. Tabor of steel or wrought iron, making and laying the pipe—

Hoffman & Bates	\$465,722
San Francisco B. Co.....	514,664

From Mt. Tabor to City Park, cast-iron pipe line—

San Francisco B. Co.....	\$313,730
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Submerged pipe—

San Francisco B. Co.....	\$97,300
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When the bids were opened, the bid of Hoffman & Bates was found to be the lowest for manufacturing and laying the pipe from headworks to Mt. Tabor, and the contract was awarded upon that bid.

On the 6th day of March, 1893, and before the contract had been executed by the Water Committee on the part of the city, with Hoffman & Bates, the following paper was executed by Hoffman & McMullen (omitting the formal parts): "Whereas, said Hoffman & Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the Water Committee of the City of Portland for doing such work, the contract having been awarded to the said Hoffman & Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said

contract equally. Each to furnish and pay one-half of the expenses of executing the same, and each to receive one-half of the profits or bear and pay one-half of the losses which shall result therefrom.

"And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike."

On the 10th day of March, 1893, a contract was entered into between the Water Committee on the part of the City of Portland and Lee Hoffman in the name of Hoffman & Bates, for manufacturing and laying steel pipe in pursuance of the bid presented to the committee in the name of Hoffman & Bates. The substance of this contract is stated in a stipulation signed by counsel for the parties found on pp. 117 to 122 both included.

Shortly after this contract was signed, the contractors sublet the work of manufacturing the pipe to Wolff, Zwicker & Buehner, and for delivering the same when manufactured, to Cook & Kiernan, leaving the remainder of the work to be done directly by the contractors. It appears from the testimony in the case that it was agreed between Hoffman & McMullen (McMullen's testimony, R., p. 167) that the business to be done in Portland or in Oregon would be attended to by Mr. Hoffman, and that any outside business that was to be transacted in the interest of the partnership would be attended to by the San Francisco Bridge Company at the direction of McMullen. Mr. McMullen (R., p. 165) says that he carried out all that the contract, Exhibit No. 1, implies, and at page 166 he says that he furnished in money or plant between \$2,500 and \$3,000. Mr. McMullen also testifies (pp. 165 to 170, R.) to the effect that he and Hoffman consulted together and

corresponded a good deal about the details of the business, and that McMullen did many things required to carry on the work. He also states that some time in 1893 Mr. Hoffman refused or desisted from making any demands upon him in connection with anything for the job, the particulars of which will more clearly appear from the letters, extracts from which will be found below, and that in December, 1894, McMullen demanded that Mr. Hoffman show him the books relating to the job, and Hoffman refused to exhibit them, or to allow McMullen access to them, and that he had demanded from Hoffman a statement of the amount of money received and disbursed in the execution of the contract, and this Hoffman declined to furnish. It should be stated here for the purpose of informing the court what services Mr. McMullen rendered which he regarded as having been done in carrying out the contract, Exhibit No. 1 (R., pp. 185, 186). The following questions and answers to and by McMullen will serve this purpose (R., pp. 185, 186):

Q. I will ask you to state if the work that you did on your part in carrying out this work, did not consist in consulting Wolff & Zwicker, and Risdon and others, about the best way to arrange your plant, and have the business carried on—excavating the ground, laying the pipe, etc.?

A. I did considerable of that character of work.

Q. Was that not chiefly what you did?

A. No.

Q. What was your chief employment?

A. "*I think the principal thing we did, or one of the principal things, which every contractor will recognize as the principal thing, was to get the job.*" Mr. McMullen refers to this subject in the same spirit at page 193, R. On p. 225, R., he further states what services were performed by himself and his engineers in anticipation of the

contract, Exhibit No. 2, and both before and after Nos. 1 and 2 had been executed.

Mr. Hoffman took actual charge of the work on the ground, and acted as the general manager of the business, and with the exception of a working plant furnished by the San Francisco Bridge Company, sent from Seattle, Wash., and the purchase of certain shears for trimming iron pipes, and some other articles, claimed by McMullen to be of the aggregate value of \$2,500 to \$3,000 (but found by the court below to be \$2,316.89), Mr. Hoffman furnished all the money required to carry on the work, over and above what was paid by the Water Committee upon estimates upon the work as it progressed. The sum so advanced by Hoffman was claimed by him to be \$10,000, besides the plant he had furnished. Mr. Hoffman made frequent calls upon Mr. McMullen to put up his share of the money to carry on the work, but Mr. McMullen never put in a dollar other than the \$2,316.89 above mentioned. The condition of the financial affairs of the contractors will be shown by quotations from letters found in the record, hereafter to be made. (R., 576-7.) *Hoffman writes McMullen (July 14, 1893):* "Now, Mac, I have put into this work just \$10,000 outside of my tools and outfit, and by the 1st of the month we will have to pay our payrolls, rivets and other bills, all told amounting to at least 4 or 5 thousand dollars more. We have now on the way trestles and valves, iron for bends, etc., which will all have to be paid before we get another estimate. We have got an estimate of \$5,000 all told, for pipe laid and trenching; of this amount, \$1,900 for trenching. By the time we pay W. & Z. and the hauling, we will only have \$3,500 to pay bills with. Now, Mac, I don't feel like carrying this work alone, and as far as borrowing money here on my note, I don't think it could be done; you can't borrow here at all. I am in the same boat you are in. I have got money coming to me, but cannot get it. I am not finding fault with your part of *the work of getting the contract*, but you must understand that we *did some work* and have been

working hard ever since, and am willing to do my part, but cannot afford to do it all; therefore, I must ask you to put in your half of what it takes to run this work. I have started a separate bank account. Hoffman & Bates put in \$10,000, and I have not changed my mind as to the amount it will take to carry this work (\$20,000) on in good shape, and I still think we are going to make good money out of this contract, but it requires a great deal of watching."

On June 9, 1893, Hoffman writes McMullen, (R., p. 574): "About money matters: I do not care to borrow any money, as I have my money all provided for; anyway, I doubt very much if we could raise any money on notes until the scare blows over a little. I think it will require about \$20,000 to carry this work along." Again *on July 31, 1893, Hoffman writes McMullen (R., p. 209):*

"Now, Mac, I want to tell you once more about money matters up here. I have now put into this thing \$15,000 in cash, and tomorrow there will not be a dollar left if we pay our bills, as we always have done heretofore. Now, there is no use of your repeating the proposition to borrow money up here, as your bridge stock and all the collateral I have got, with our notes attached, would not borrow \$20,000, nor would I undertake to raise \$5,000 here now, nor could we have done so within the last forty days. It is a good deal for you to ask of me, to take this work and run it and furnish all the money, and not do anything else. You are taking work all over the country, putting your money into other work, and I cannot do anything but sit here and manage this job. The Water Committee have not sold their bonds, and if they should fail to sell them, I would have not less than \$20,000 to pay for work performed this month. Now, Mac, I am willing and ready to live up to my agreement in this contract, and you must do the same. I don't feel as if I was treated right in this matter. We went into this thing together; you agreed to put up your part of the money, and I agreed to put up my portion, and arranged for it. If you will put in \$8,000 cash, in addition to the plant furnished, I will try and carry the work along, but this amount I must have not later than the 5th, as I must use part of my money in

other places by that time. Please let me hear from you on receipt of this."

This letter McMullen answers on the 3d of August, 1893 (R., p. 555): "We note yours of July 31. It is not possible for me to make the remittance you demand. Were it, you would not have to demand it. It is possible that I may be able to send you \$5,000 next week; this, however, will depend upon whether we succeed in making certain collections. I can only tell you that I will do my utmost to furnish some funds to help handle that job, and for what money and time you put into the job more than I do, I trust I shall be able to make you a satisfactory compensation. I think you are too sensitive about paying everything when it is due; no one else does that these times. I will tell you what I do in my business. When I have money, I pay, and when I do not have money, I tell the people so, and let them wait, and people with ten times the money and resources that I have treat me in the same way. Our labor is the only thing we strain a point to meet promptly.

"Had I been running that job, everything* I bought for it I should have agreed to have paid when I received my estimate on it—when it went into the work. A firm of your credit could readily have done this. This is what we do invariably. If, as you intimate, the city should not pay, it seems to me that would be sufficient reason for your not paying, and that you ought not to be worried on that score. It is hardly fair for you to intimate that I asked or expected you to furnish all the money, and do nothing to run that job, after I have explained to you that it was because I was utterly unable to send you any money at this time. . . . I realize that it is not the explanations that you want; that it is money; and I will try and see what I can do. *Meantime, stand them off.*"

McMullen says, under date of July 22d (R., p. 552-3): "Now, Lee, with regard to money: I recognize that it is incumbent upon me to put up half of the money to run this job with, and I stand ready to do anything that it is possible for me to do, but for the last sixty days I have had all I could do to get along, and it does not look a bit better for the next sixty

days to come; after that time we will begin to get in some money. I think we ought to be able to raise a loan in Portland on joint account. I am not only willing to put up the bridge company's note for it, but I am willing to deposit as collateral with said note 14,032 out of a total of 25,000 shares of the capital stock of the company. A fair valuation of the company's assets, over and above its liabilities, shows it to be worth over \$375,000. This would make this stock worth \$15.00 per share, or a total of \$210,480. Don't you think it would be better to borrow the money on joint account there, so as to use your credit and ours, too; and instead of borrowing \$10,000, let us go in together and borrow \$20,000 or \$30,000, or whatever sum is needed? Open a bank account. We certainly ought to get money in Portland, Lee; that is the proper place, that is where the work is. I am willing to give my note and pledge my stock in the company with you and borrow the money from an individual—some capitalist, you should know some one—if you prefer. I am willing to do anything that I can do, and if it were not for this unlooked-for financial stringency, I could probably have sent you the money from here; but, as I have explained to you in my former letters, you know how I have been crowded on account of this stringency." See letters of McMullen to Hoffman, June 6, 1893, R., p. 548; June 15, 1893, R., p. 549; July 6, 1893, R., pp. 550-551; August 4, 1893, R., pp. 556-7-8.

On September 11, 1893 (R., p. 579), Hoffman wrote McMullen: "The water-works contract is very much mixed up. Last Thursday the committee held a meeting and called me in and told me they had no money to pay me on the 20th of this month, and told me they did not know if they could sell any bonds at all or not, and I could keep on or stop, just as I choosed to do. I insisted that it was for them to say if I should go ahead or not, as they had a right to stop the contract, but I did not, as it would involve me with my sub-contractors, but they would not tell me to stop, so I had to keep on. Our estimate is \$66,000, and they have \$40,000 that they are going to divide equally among all the contractors, so we will get about \$20,000, and, after paying Wolff & Zwicker and Cook &

Kiernan their *pro ratio*, we will have about \$9,000 left to pay about \$22,500 pay-roll, section men included; besides iron gates and supplies besides, this month. Now, Mac, I am compelled to insist that you raise your proportion of this money, as I will absolutely not carry this work any longer this way. You will either have to put up your share of the money or let go the contract, as you agreed to do. I have held off as long as I could, with the hope that I could swing it alone, but I cannot do it any longer. I don't want you to think that I am taking advantage of hard luck you are in, but you can see the necessity of having money. If you will furnish \$10,000 by the 20th, I will carry on the contract the same way I did before; but this amount I must insist on your furnishing, or you must let go, and I will get some one in that will furnish part of the money. I still think we will make some money. We are not going to make very much, but we will make some if we don't have too many leaks after we get the water turned on. Now, Mac, I don't want you to think that I want to take advantage of you, because I don't, and if it was you that was doing this work and I could not do my share, I would not ask you to do it for me. If I could do this alone, I would; but I absolutely can't do it. Please let me hear from you at once, as I must do something with this work before pay-day."

Mr. McMullen's reply to this letter is dated September 14, 1893 (R., pp. 558-9-60). The letter advises Mr. Hoffman of various methods by which he thinks Hoffman could provide money; says he can put up none himself; denies he ever agreed to let go the contract.

On the 16th of September, 1893 (R., p. 580), Hoffman writes McMullen: "Yours of the 14th at hand and contents noted. Now, Mac, there is no use for you to tell me how to do business. I have done business here for a number of years to suit me, and shall keep on if possible. It is all very well to tell me what to do if you are in S. F., but I am here, and know just what is wanted. Now, I want to tell you, once for all, that unless you put up your share of the money, namely, \$10,000, by the 20th of this month, I shall not recognize you in the contract after that

date, and shall make such arrangements as I see fit. If the San Francisco Fridge Company has got the credit you claim it has, and I have no doubt but what it has just got what you say it has, San Francisco is the place for them to raise money to carry on their portion of this work. You seem to raise money enough to carry on the Spokane and Yakima work, but you can do nothing for this. Now, there is no use of our talking this matter over any further. I have told you what I want you to do. If you want to take this work and run it, you can do so. I will put up my portion of the money. But I draw the line on that. Hoping to get your share of the money by the time specified, I am, yours very truly."

Under date of September 18, 1993 (R., pp.560-561-562), Mr. McMullen replies to Mr. Hoffman's letter of the 16th, in which he suggests how the business ought to have been carried on, how and when payments should have been made, and says, p. 561: "I hardly expected such a proposition from you, Lee, that you would not recognize me in the contract if I did not do thus and so. You must understand that nothing you can do will change my rights in the premises, and if you attempt anything of the kind, you will only injure yourself. If I were in a 'kicking' mood, and wanted to find fault, I might have as much reason, with some things that you have done in connection with that work, as you have to upbraid me for my shortcomings; but I have no desire to recriminate. I trust that on more mature reflection, and with a better outlook on the financial horizon, you will see the folly of the proposition that you put forth in your letter. I assure you, Lee, that you will have no occasion, when you get through, to have any misunderstanding or row with me, unless you persist in making one; if you do, I shall have to accept the situation."

The testimony of Henry Failing, president of the Water Committee (R., pp. 381, 382, 383, 384, 385, 386, 387, 388), and of Frank T. Dodge, secretary of that committee (R., pp. 406, 407, 408), show the financial conditions of the committee from the 1st to the 20th of September, from which it appears that the committee was without sufficient

money to pay bills which it was known would fall due on the 20th. No sale of bonds had been made from which money for this purpose could be obtained, nor was there any certainty that sales would be made in time, or at any time, to meet payments then to fall due. On the 7th of September, Mr. Hoffman was called before the committee and advised of the situation. It was to this interview and the information derived from it that Mr. Hoffman refers in his letter of the 11th of September, when he calls upon Mr. McMullen for \$10,000 by the 20th. On the 20th of September, after three o'clock, a telegram, a message, was received by Mr. Failing, informing him that a block of bonds had been sold, and Mr. Failing advanced the money for the purchasers, so it became available at once to pay the bills then due. The committee had some money on hand which it had decided to divide pro rata among the contractors, and warrants had been made out for the amounts to which each would have been entitled in the distribution of that fund; but fortunately, just before they were delivered, news was received of the sale of the bonds, and these warrants were destroyed and others made out for the full amounts due. After that date no difficulty was experienced in selling the bonds; all bills were promptly met. Mr. Hoffman regarded this action of Mr. McMullen in refusing to comply with his request to put up his proportion of the money upon the terms suggested as a dissolution of any partnership which might have existed between them, and from that time forward all correspondence ceased.

Hoffman proceeded with the work and completed it, so that the water was turned in full head on or about January 1, 1895. Under the contract with the city, Exhibit No. 2, the contractor guaranteed the pipe to stand for six months, and could not be finally delivered to the city until after a test for that time. Payments were made to Hoff-

man upon estimates made by the city's engineer as the work progressed, to the amount of 90 per cent., 10 per cent. being retained by the city, or the Water Committee, to be paid when the work was finally completed and turned over. Some extra work was done not embraced in the contract, and some work claimed by Hoffman to be extra work, and for which he claimed extra compensation, was denied by the committee to be extra, but it claimed that the work was within the requirements of the contract. Some money had been paid to Hoffman for the extra work admitted to be such, and some money was admitted by the committee to be due for such extra work.

The record shows that when the work was completed the 10 per cent. retained was \$50,982.52, and 10 per cent. retained on account of extra work was \$2,263.43. That there were claims made by Hoffman for what he claimed was extra work, but which the committee claimed was within the terms of the contract, amounting to \$16,961.25, and was therefore disallowed and unsettled. Hoffman had exclusive charge of the pipe line after the water was turned in, and made all repairs and stopped all leaks, McMullen having nothing to do with the matter. Under this contract with the city, the work could not be finally turned over to the city before the 1st day of July, 1895, the water having been turned in on the 1st day of January, of that year, and the 10 per cent. retained by the committee could not be paid over before that time, and it was impossible for the contract to be completed until the line was turned over and the money paid. Mr. McMullen having been denied access to the books relating to this work in December, 1894, on the 19th day of April, 1895, filed his bill in this cause, alleging substantially the following matter:

That prior to the 6th day of March, 1893, the City of Portland, acting through its Water Committee, published advertisements, inviting bids for the construction of a

system of water-works for said city, or for certain portions thereof, for conveying water from Bull Run river to the City of Portland, for the use of the city.

That before the time for receiving such bids arrived, McMullen and Hoffman agreed that *they would jointly* endeavor to obtain the contract for the same or some part thereof, *and that in their joint interest* a bid should be put in for the construction of said water-works or of some portion thereof, and that, in case they were successful, *they would share equally* in such contract as resulted from their bid; that *pursuant* to said *agreement between Hoffman & McMullen* and in their joint interest a bid was put in by Hoffman in the name of Hoffman & Bates (that being the name under which Hoffman was doing business) for the manufacture and laying of steel pipe from the head works of said system to Mount Tabor, which bid was found to be the lowest bid for said work, and Hoffman was declared to be the successful bidder and entitled to a contract with the City of Portland therefor; and thereupon, in evidence of the interest had by Hoffman & McMullen in said bid and the contract with the Water Committee, to be entered into thereon and the work to be done thereunder, on the 6th day of March Hoffman & McMullen entered into a certain written agreement that they would share equally in such contract as should be entered into between Hoffman & Bates and the City of Portland touching the work covered by said bid. Each of them, Hoffman & McMullen, to furnish and pay one-half the expenses of executing said contract, and each to receive one-half the profits, or bear and pay one-half the losses which should result therefrom; and further, that in case either party should get a contract for doing or should do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses of said contract or work should be shared and borne by Hoffman and McMullen equally.

That on the 10th of March, 1893, a contract was entered into between the city and Hoffman & Bates, for the joint interest of Hoffman & McMullen, in compliance with the said bid of Hoffman, upon which the contract was awarded, wherein the city agreed to pay for the work specified to be performed, and among other rights reserved by the city it was provided that the said Hoffman should guarantee the said city against all loss, cost or damage from breaks or leaks for a period of six months after the water should have been running full pressure through the whole length of said pipe; that it was provided that monthly estimates should be made of the work done, and payments therefor, less 10 per cent. reserved by the city, should be made on the 20th day of the following month, and the balance within 20 days after the completion and acceptance by the Water Committee.

That Hoffman & McMullen proceeded with the work and completed the same on or about January 1, 1895, and that the city accepted the same, except as provided in said contract for the maintenance thereof for six months.

That McMullen contributed valuable services personally, and of his employes and servants, and contributed money and property to the amount and value of \$2,414.46, and has always been ready and willing to render all services required of him, in the conduct and management of said business. That he has performed services, advanced money and provided equipments, the amount of which he cannot state.

That Hoffman & McMullen did some extra work, supplemental to and connected with said contract, for which Hoffman has been paid in part.

That when the contract between Hoffman & McMullen was entered into it was agreed that Hoffman should superintend the work to be done in Oregon, employ men, purchase supplies and receive pay from the city. That

Hoffman performed this work and purchased supplies, etc., except a certain hydraulic punch and shears purchased by McMullen.

That Hoffman had general management and control of the work, and disbursed all money, and kept books showing a full account of the business.

McMullen was all the time a resident of San Francisco, Cal., and only occasionally visited Portland, and casually inspected the work, had no oversight of the work as it was done, and kept no books of account touching the same.

That about December 14, 1894, McMullen applied to Hoffman for leave to examine the books, in which accounts of said contracts and the work pertaining thereto were kept, but Hoffman refused to allow him to see the books.

That Hoffman has received on account of said contract and extra work in connection therewith, and with said pipe line, \$35,000 over and above all expenditures made or incurred.

That all the money received by Hoffman has been appropriated to his own use, and he refuses to render McMullen any account thereof.

That the profits of said venture are \$80,000, and that the assets of the copartnership, besides the money \$35,000 and the 10 per cent. retained by the city, consist of plant, tools and other personal property in Oregon, valued at \$5,000 or thereabouts.

The bill closes with the following allegation and prayer:

Inasmuch, therefore, as the defendant has denied to your orator all his rights as a partner in the contract entered into between them, as above set forth, and the work done thereunder, as well as the other work done for the city of Portland, and has refused to give your orator any information touching said contract or said work, or to allow your orator to have access to the books or records having reference to said work, and is withholding from your orator moneys paid to him by the City of Portland, and which should be now paid over to your orator under the

contract between him and the defendant above set forth, it is necessary that there should be a dissolution of the copartnership existing between the defendant and your orator in regard to said work, and inasmuch as some portion of said work is yet to be done, it is necessary that a receiver should be appointed to take charge of and to execute and complete the same under the orders and direction of this court, so as to earn and be entitled to receive the moneys now withheld by the City of Portland on account of the work done under the contract between the defendant and said city, and to draw and receive from said city the moneys now withheld, and hold and disburse the same under the orders of this court, in order that the affairs of the partnership may be fully administered and wound up, and loss may be averted from both the defendant and your orator.

To the end, therefore, that the defendant may, if he can, show why your orator should not have the relief hereby sought, your orator prays that he may be required to make full, true, direct and particular answer and discovery to all and singular the allegations and matters set forth in this bill of complaint, but not under oath, an answer under oath being expressly waived; and that a receiver may be appointed to take charge of the records, books, papers and all other goods and effects of said partnership, and to preserve and dispose of the same under the direction of this court, and also to take charge of and perform all the uncompleted work under said contract with the City of Portland aforesaid; to-wit, the keeping of the conduit pipe, mentioned in said contract, in repair for so much of the period of six months from the acceptance of the work by said Water Committee as may yet have to run, and to do every act and thing necessary to earn and be entitled to receive from said City of Portland the 10 per cent. of the contract price of said work still unpaid, and that said receiver thereupon be authorized and directed to draw and receive from said city and through said Water Committee all moneys owing from said city in respect of the work done under said contract, and as well any and all other moneys owing from said city for work done outside of said contract, in order to bring Bull Run water to said

city, and that he may make sale of all tools, equipment and other personal property belonging to the partnership and used in said work, and hold the proceeds thereof, and all other moneys coming into his hands, subject to the final disposition of this court; that the defendant may be required to deposit and leave with the receiver during the pendency of this suit all books of account, papers and records he may have in his possession, withholding none of them in any wise bearing upon said work, or the moneys paid or owing for the same, said books, papers and records to be, at all seasonable times, open to the inspection of your orator, his agents and legal counsel, with leave to take copies of the same; that the defendant may be enjoined and restrained during the pendency of this suit from making sale or other disposition of the tools, equipments or other personal property belonging to said partnership, and from receiving from the City of Portland the moneys by it withheld on account of the contract entered into between the defendant and the city, and the work done thereunder, as well as any moneys which may be owing for other work done to bring Bull Run water to the City of Portland, or any portion of any such moneys, and that he may be in like manner enjoined and restrained from making any transfer or assignment or other disposition of said moneys, or any portion thereof, or any claim or right he may have therein; that an account may be taken and stated between the defendant and your orator of the dealings and transactions of the partnership, and after making to the defendant due allowance for such service as he has rendered and property or money he has advanced for the work performed by himself and your orator, as above set forth, and making your orator due allowance for such services as he has rendered and property or money he has advanced for said work, the amount of profit realized on said work and the amount owing to your orator on account thereof may be ascertained and determined, and paid over to him, and that thereupon the partnership existing between the defendant and your orator may be dissolved; and that your orator may recover from the defendant his costs of this suit, and may have such further or other relief as may be in keeping with equity and good conscience. Then follows a prayer for an injunction in the usual form.

A restraining order was issued substantially in compliance with the prayer of the bill, but the court refused to appoint a receiver.

Lee Hoffman, the original defendant, answering the bill of complaint, admits that before the time named for receiving bids had arrived, it was agreed by and between McMullen and himself that they would endeavor to obtain some part of the contract for bringing said Bull Run water to Portland, but denies that they at any time agreed that they would jointly endeavor to obtain such contract, but on the contrary it was agreed at said time that they should not act jointly but severally, the defendant acting in the name of Hoffman & Bates, and the complainant acting in the name of the "San Francisco Bridge Co.," a corporation organized and existing under the laws of California.

Denies that it was agreed that joint bids should be put in for the construction of said water works or portions thereof, but alleges the fact to be that it was mutually and secretly agreed between them, before the bids were filed with the water committee, that complainant should make and file several bids for portions of said work in the name of said San Francisco Bridge Co., and defendant should file a like number of bids for the same portions of said work with said committee, in the name of Hoffman & Bates, and that said bids should be so as not to compete with each other, but so as to avoid it.

That it was further agreed that for that purpose and to more surely effectuate the object of getting a contract for said work at as high a figure as possible, and for the purpose of enhancing the profits of complainant and defendant, both complainant and defendant, before said bids were filed, should examine the same and know the contents thereof, and that, pursuant to said understanding, the complainant did submit to the defendant for his examination and approval the bids which he proposed to

file with said committee. . . . And in like manner the defendant submitted to complainant for his approval the bids which he proposed to file with said committee, and defendant disapproved complainant's bid and required that it be raised about \$98,000 above and more than that complainant proposed and intended and was about to bid for said work, which was done; and complainant disapproved of defendant's bid, and required that it be reduced about \$13,000 below what defendant proposed and intended to bid for said work. . . . which was done. And the said bids containing the amounts secretly agreed upon by said parties were then filed with said water committee. And the complainant and defendant mutually agreed to share the profits and losses in the execution and performance of said contract, and for greater certainty defendant asks leave to refer to said bids on the trial. That for the purpose of enhancing the profits of plaintiff and defendant it was further secretly agreed and understood between them, and they secretly combined and acted together for the purpose of apparently competing for said work and furnishing said material, but not in fact to do so, and for the purpose of advancing the price of said work and materials to the City of Portland over and above what it would otherwise have been required to pay for the same work and materials, and of getting the contract at such advanced figures. All of which were, in fact, accomplished by the acceptance of the water committee of the bid made by Hoffman & Bates. (Rec., p. 30.)

The answer further avers, that in inviting bids for said work and material, the same was divided into distinct classes by the committee, and bidders were required to submit bids stating the amount for which he would perform the particular work described in the invitation to bid, and the bid. That in preparing bids for the materials and work afterward awarded to the defendant . . . com-

plainant and defendant agreed and combined together to obtain the highest possible price from the city for the same, and so arranged their respective bids for the various kinds of work and material required, as that they should not operate as competing bids, although appearing to said committee to be so.

The defendant bid in the name of Hoffman & Bates for manufacturing and laying the pipe, \$465,667. On *furnishing steel plates for pipes*, \$359,278.80. On *bridges*, \$33,562.94. On *headworks*, \$17,800.

The complainant bid in the name of the San Francisco Bridge Co., on manufacturing and laying pipes, \$514,664; on *steel plates*, \$348,781; on *bridges*, \$31,279.07; on *headworks*, \$16,550; said several items were arranged as stated by and between the complainant and defendant, and it was understood between them and a part of the scheme by which bidding was carried on, that in case the bid of Hoffman & Bates, for manufacturing and laying the pipe, should be the lowest and should be accepted by the city, and in case the bid for the San Francisco Bridge Co. for furnishing steel plates for pipes should be the lowest bid, and should be accepted by the city, and the bid for the same work by Hoffman & Bates should be the next lowest, said complainant would decline to accept said work and by that means induce the city to accept the higher bid of the defendant, and the same course was to be pursued with all other portions of said work upon which both said parties bid.

That one of the conditions attached to said bidding by the committee was that each bid should be accompanied by a certified check equal to 5 per cent. of the amount of the bid.

That as soon as the bid of Hoffman & Bates was accepted by the city, the contract existing between complainant and defendant was executed, the complainant

and defendant agreeing in writing under their hands and seals in effect thus (Rec., pp. 43-4): *Whereas*, the said Hoffman & Bates have, with the assistance of said McMullen, the complainant, at a recent bidding, on the manufacturing and laying steel pipe from Mount Tabor to the headwork of the Bull Run water system for Portland, submitted the lowest bid for said work, and expects to enter into a contract with said water committee of the City of Portland for doing such work, the contract having been awarded to Hoffman & Bates on said bid: It is hereby agreed in and by said writing, among other things, that said Hoffman, the defendant, and said McMullen, the complainant, shall and will share in said contract (with the said water committee of the City of Portland) equally, each to furnish and pay one-half of the expenses of executing the same, each to receive one-half of the profits, or bear and pay one-half the losses which shall result therefrom. This contract is set out in full in the transcript at R., p. 16.

The answer alleges that the said bids by the San Francisco Bridge Co. and by defendant in the name of Hoffman & Bates were in the joint interest of complainant and defendant, but denies that one single bid was in their joint interest.

Defendant admits that a bid was put in, in pursuance of the agreement in this answer stated, in the joint interest of complainant and defendant in the name of Hoffman & Bates for the manufacture and laying of steel pipe from Mount Tabor to the headworks at Bull Run, which bid was found to be the lowest for said work, which is the bid above referred to. And admits that the defendant was declared to be the successful bidder.

Alleges that the contract dated the 6th day of March, 1893, between McMullen and Hoffman, hereinbefore referred to, was a part of and made to aid in carrying out

the unlawful combination and confederacy entered into between complainant and defendant hereinbefore more particularly stated and alleged.

Admits that the contract in the complaint mentioned, between the water committee and Hoffman & Bates, dated the 10th day of March, 1893, was executed as alleged.

Denies that upon the execution of said contract, complainant and defendant proceeded with the performance of the work therein contemplated, or on or about the 1st day of January, 1895, or at any other time, completed the same, or any part thereof, or made delivery thereof to the City of Portland; but alleges the fact to be, that defendant alone proceeded with said work and completed the same at the time stated, and turned the same over to the City of Portland; but admits that the same was accepted by the city, subject to the obligations imposed by the said contract, as to maintenance of said pipe, repairs on the same, and damages for leaks and breaks, for six months after the same was accepted by the city, and admits that on said day, the city turned water under full pressure into said pipe, the whole length thereof, and it has since been running in it.

Denies that complainant contributed services of either himself or his employes, toward the execution of said work, or that he contributed money to the amount of \$2,414.46 or any other amount. Denies that complainant has been ready or willing to render, or has rendered, any services whatever which might be required in the prosecution of said work.

But, on the contrary, defendant alleges that as soon as the written agreement between complainant and defendant was executed, complainant left the State of Oregon, and thereafter neglected, failed and refused to render any aid or to assist the defendant in any way whatever, in carrying out said contract with the City of Portland.

That in the first place the defendant was required to give to the City of Portland a bond with sureties for a very large amount, to wit, \$140,000, for the due performance of said work, and the defendant requested the complainant to furnish a portion of the sureties on said bond, but complainant refused to do so or to aid the defendant in any manner to procure said sureties.

Avers that a large amount of money was necessary to be raised from time to time in the performance of said contract with said water committee, and defendant was without the necessary means and resources to procure the same.

That he continued to apprise the complainant from time to time, up to about the 16th day of September, 1893, of his circumstances, and condition financially, and requested the complainant to furnish one-half of the money actually necessary to the successful prosecution of said work, and the performance of said contract, but the complainant positively declined and refused to furnish any money whatever to aid in the prosecution of said work, or the performance of said contract, claiming he had no money to put into the business.

That by reason of the failure of the complainant to perform his part of the said alleged agreement of partnership, the defendant, on the 16th day of September, 1893, dissolved the same and notified the complainant of such dissolution, and complainant thereafter assented to said copartnership being dissolved and terminated.

Alleges that complainant not only refused to furnish any security in the said bond required under said bid of Hoffman & Bates, . . . and required defendant to furnish the said bond and all the sureties thereon, but refused to furnish his proportionate share of the money required and necessary to carry on the work under said contract, . . . but complained of defendant that he would not

and did not refuse to pay supply and other necessary bills of expense incurred in carrying on said work, and recommended that instead of paying such bills, defendant should stand creditors off; declared that defendant was very foolish to try to meet every payment promptly; said "He would stand them off for everything or pay them 50 cents, or whatever he could out of the estimates, and such things as supplies for camps he would not pay for six months, if he did not feel like it," although defendant had been obliged, in securing supplies and labor, to contract for paying for the same at the end of each month, as complainant well knew; yet complainant refusing to put in his share of money to pay these bills, . . . desired defendant to disregard his contract and "stand off" the creditors, as aforesaid.

Alleges that on the 16th day of September, 1893, defendant had advanced from his own funds on account of said work, \$15,990.

That bills to fall due September 25 amounted to about \$22,500.

That on the 11th day of September, 1893, defendant was notified by said committee that it was without funds with which to pay the estimates for the completed work for the month of August, and had no assurance when money for that purpose could be obtained.

That in order to be prepared to meet the payments so to fall due on September 25, defendant, on his own account, by furnishing his own collaterals, secured at considerable loss and sacrifice \$14,000, which would not have been necessary or required if complainant had not refused to provide the money he promised and agreed to furnish. That said plant furnished by defendant at Seattle by request of complainant was purchased from the San Francisco Bridge Co., and bills therefor were rendered by said company to Hoffman & Bates, as well as for the said

hydraulic punch and shears in complainant's bill mentioned. And said Hoffman & Bates forwarded and tendered to said San Francisco Bridge Co., at San Francisco, Cal., full and complete payment of the several sums and amounts claimed in said bills. That the San Francisco Bridge Co. refused to accept the money so tendered. That defendant has at all times since said bills were rendered been able and willing to pay the same, and is now ready and willing to pay for said material, punch and shears in full.

Denies that defendant and complainant did other work for bringing Bull Run water to Portland in connection with or supplementary to the work done under said contract between the defendant and the City of Portland.

Admits that defendant has been paid by the city the stipulated amount of *ninety* per cent. of the contract price, as claimed by said complainant, and the other *ten* per cent. as claimed by said committee, is withheld until compliance is made with the guarantee in said contract as to keeping the line of pipe in repair, and saving the city harmless from damage by leaks or breaks for six months from the date of the completion of said contract.

Admits that he has been paid a large part of the cost and value of the other work performed for said committee, but not wholly paid.

Admits that various modifications were made in the work on the contract, but cannot say just what they were.

Admits that it was agreed when the contract was entered into, that defendant was to have and exercise personal supervision over work to be done under the proposed contract; make all purchases, hire all labor, and generally to manage matters connected with the execution of said work; to draw and receive all moneys to be paid for said work, and to disburse the same for account of said work as might be required.

Alleges that it was understood and agreed between complainant and Hoffman that for such services Hoffman was to have and receive and to be paid out of the money to be drawn from said water committee, a reasonable compensation, and that one thousand dollars per month is such reasonable compensation.

Defendant admits that he assumed and exercised personal superintendence of said work and made all purchases except a certain hydraulic punch and shears, but denies that complainant purchased the same, and avers that defendant ordered them and they were paid for by the San Francisco Bridge Co.

Admits that defendant employed all labor and exercised general management within the State of Oregon over all the matters connected with the execution of said work, and received all moneys paid by the City of Portland on account of said work, and disbursed the same as far as there was any occasion for disbursement. Admits he kept full accounts of the whole business, and now has full records thereof.

Admits that during the time said work was being done complainant was a resident of San Francisco, Cal., and was only occasionally in Portland, made only casual inspection of the work as it progressed, but had no oversight of the work as it was done. Don't know whether complainant kept any book of account connected with the work or not.

Does not know whether complainant has any knowledge of work done other than what was included in the contract with the city.

Admits that all of said matters and things are fully set out in the books and records kept by defendant.

Admits that he has now the several monthly estimates rendered him by the engineer of said committee, and denies that the last of said estimates will or does show all the

money earned or paid on said contract or other work done to bring Bull Run water to Portland.

Admits that about the 4th of December, 1894, at the City of Portland, the complainant requested defendant to allow him to inspect the records and books of account and demanded of defendant an accounting of the dealings and transactions of said alleged copartnership.

Admits that, notwithstanding said alleged contract with defendant, touching said work and his pretended rights as an alleged partner therein, defendant then refused and has ever since refused to render any account thereof to complainant, or to allow him to inspect the records or books of account kept by defendant touching said work, or any monthly estimates rendered defendant by the engineer of said committee.

But alleges that he refused to allow such examination, as he then and still believes he might lawfully, properly and justly do for the causes and reasons hereinbefore in this answer stated.

Admits that the city has already paid him in excess of \$35,000 or more, over all expenditures or liabilities which defendant has incurred on account of his contract, and admits the same is expected profit on said contract.

Denies that any part of the money so paid by the city to the defendant is due to complainant, and denies that he has converted all or any of said money to his own use.

But admits that he has refused and still refuses to render to complainant any account, or payment thereof, although complainant requested the same.

Admits that on the 4th day of December, 1894, he denied and still denies the assumed and alleged rights of the complainant as a partner in said work, and his alleged rights to an equal or any share of the profits thereof.

Denies that the profits made by the defendant and complainant upon the work done for the City of Portland were

\$80,000 or any other sum. Denies that said complainant did any work for the said City of Portland and alleges that from the time said bid of Hoffman & Bates was accepted by the said committee, the complainant refused to aid in any manner in said work or otherwise than to request defendant to go upon the same for a small remnant of a plant then owned by the San Francisco Bridge Co., of no greater value than \$1,062.82; and denies that one-half of said sum of \$80,000 or any other sum should be paid complainant.

Denies that the assets of said partnership are \$5,000 or any sum.

Admits he has on hand part of the plant used in doing said work, but alleges that the same is pretty well worn out and is of little value.

Denies that any receiver should be appointed to take charge of the books, etc., of said pretended partnership, or to take charge of or perform all or any of the uncompleted work under said contract with the City of Portland, namely, the keeping of said conduit mentioned in said contract in repair for so much of the period of six months from the acceptance of said work by said water committee as may yet have to run, or to do any or every act or thing necessary to earn or be entitled to receive from said City of Portland the 10 per cent. of the contract price of said work still unpaid.

Denies that complainant is entitled to or ought to have the relief demanded in said bill of complaint, or any part thereof, or to have any accounting or injunction or receiver herein.

Seventeen exceptions were filed by the plaintiff to the answer for insufficiency and impertinence, four of which were allowed and the remaining thirteen overruled.

The opinion of the court upon the exceptions is set out in the record, p. 58. The plaintiff then filed a general repli-

cation. Testimony was taken and the case was heard upon the merits and a decree was rendered in favor of the plaintiff (R., p. 96). The defendant appealed to the United States circuit court of appeals for the ninth circuit, and that court reversed the decree of the lower court (R., p. 595). * Application for rehearing was denied, and the plaintiff thereupon applied to this court for its writ of certiorari, which was allowed, and the case is now here for trial.

ARGUMENT.

The complainant rests his right to recover in this suit upon the ground that himself and Hoffman were joint bidders at the letting of the work described in the bill. That their joint bid was presented to the water committee in the name of Hoffman & Bates, and upon this bid the contract was awarded in the name of Hoffman & Bates, but was, in fact, the joint contract of McMullen and Hoffman. That the contract was in part performed by them jointly and that profit was realized, a portion of which has been paid to Hoffman, and he refuses to pay McMullen his share, and McMullen sues to recover it.

Answering the claim of McMullen, Hoffman denies that himself and McMullen were joint bidders, but avers that they were to and did bid separately and severally, but had a *secret* agreement to be jointly interested in any contract which might be obtained for the construction of the Bull Run water works. Avers that the contract secured by such means was void as against public policy, and that the agreement between himself and McMullen to execute the contract so obtained by them was fraudulent and is also void and cannot have the aid of the court to enforce it. To avoid this contention on the part of Hoffman, McMullen claims that after the contract had been awarded on the bid which is claimed to be fraudulent, and after the alleged

fraud had been completed, McMullen and Hoffman entered into a written agreement to execute the contract so awarded, and to divide the profits between them. That this last agreement is a new and separate transaction wholly disconnected with the fraudulent agreement and acts by which the contract with the city was obtained, and may be enforced, although their own acts in obtaining it were ever so vicious and fraudulent.

Joint Bidders.

In *Atchison v. Mallon*, 43 N. Y. 147, 151, Judge Folger, speaking for the New York court of appeals, says: "A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed and not secret. The risk, as well as the profit, is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid."

If this statement be accepted as the true rule in cases of joint bidding at public lettings, (and I believe it has been adopted as such by counsel for McMullen in this case (Resp. Brf. C. C. of App., p.19), it is proper next to examine the facts and find, if we can, whether McMullen and Hoffman have brought themselves within it. The answer admits that pursuant to the alleged agreement between McMullen and Hoffman, stated in the bill of complaint, and in their joint interest, a bid was put in by the defendant in the name of Hoffman & Bates for the manufacture and laying of the pipe, which was found to be the lowest bid for said work, and a contract was awarded upon it. Admits that in *evidence* of the alleged interest had by McMullen

and Hoffman in the contract to be entered into between the water committee and Hoffman & Bates, on said bid, they executed the writing Plff. Ex. No. 1, but defendant avers that said contract last referred to is the same contract referred to in the former part of said answer and was part of it, and made to aid in carrying out the unlawful combination and confederacy entered into between the parties, in the answer more particularly described. (R., pp. 30, 31). The answer denies that it was agreed between the parties that joint bids should be put in for the construction of said water works or of certain portions thereof, but, on the contrary, avers the fact to be that it was mutually and secretly agreed by and between the parties before the bids were filed with the water committee that the complainant should make and file with said water committee several bids for portions of said work in the name of the San Francisco Bridge Company, and the defendant should, in like manner, make and file several bids with said committee for the same portions of said work in the name of Hoffman & Bates, and that bids should be made so as not to compete with each other, but so as to avoid it. That it was further agreed that for that purpose and to more securely effect the object of getting a contract for said work at as high a figure as possible and for the purpose of enhancing the profits that the bids so prepared should be seen and examined by each of them, and that in pursuance of such understanding McMullen did submit the bids he had prepared to Hoffman for his examination and approval, and in like manner Hoffman submitted to McMullen for his examination and approval the bids he had prepared. That Hoffman disapproved of McMullen's proposed bid for manufacturing and laying pipe, and required it to be raised, and it was, in fact, raised about \$98,000 above what McMullen proposed, intended and was about to bid for the work; and that McMullen disapproved of Hoffman's bid

for the same work and required it to be reduced about \$13,000, which was done. (R., pp. 29, 30).

The answer further avers that for the purpose of enhancing the profits of the parties it was further secretly agreed by and between McMullen and Hoffman, at said time, and they so secretly combined and acted together for the purpose of apparently competing for said work and furnishing said materials, but, in fact, not to do so. (R., p. 30).

The answer further avers that in preparing bids for the materials and work afterwards awarded to Hoffman & Bates, McMullen and Hoffman agreed and combined together to obtain the highest possible price from the city for the same, and so arranged their respective bids for the various kinds of work and materials required as that they would not operate as competing bids, although appearing to the committee to be so. It must be remembered that no bid whatever was presented to the committee in the name of Hoffman & Bates and the San Francisco Bridge Company or John McMullen as joint bidders, but the answer avers, and the undisputed proof shows, that bids were put in by Hoffman & Bates and by the San Francisco Bridge Company severally and separately as follows:

Hoffman & Bates, manufacturing and laying	
pipe	\$465,667.00
Furnishing plates	359,278.00
Bridges	33,562.94
Headworks	17,800.00

McMullen, in name of San Francisco Bridge

Company, manufacturing and laying	\$514,664.00
Furnishing plates	348,781.00
Bridges	31,279.07
Headworks	16,550.00

(R., pp. 30, 31).

It will be noticed that the totals of all these bids are:

Hoffman & Bates, \$876,307.94; San Francisco Bridge Company, \$911,274.07.

The answer further avers that the several items of said bids were arranged by McMullen and Hoffman, and it was understood and agreed between them and a part of the scheme upon which bidding was carried on, that in case the bid of Hoffman & Bates for manufacturing and laying the pipe should be the lowest and should be accepted by the city, and in case the bid of the San Francisco Bridge Company for furnishing the steel plates for pipes, should be the lowest bid and should be accepted by the city, and the bid of Hoffman & Bates should be the next lowest, said McMullen would decline to accept said work, and by said means induce the city to accept the higher bid of Hoffman & Bates; and the same course was to be pursued with all other portions of the work upon which both parties bid.

If these averments of the answer are supported by the evidence the case thus made would not show McMullen and Hoffman to be within the rule laid down in *Atchison v. Mallon*; and any contract they may have secured or entered into or agreement they may have made upon the basis of such actions as the answer describes would be void as against public policy, and no court would lend its aid to enforce it.

What does the evidence show?

The bids themselves are conclusive evidence that McMullen and Hoffman did not agree to bid jointly for the work to be let, but that they agreed to bid severally, and they did, in fact, bid severally and not jointly. This the bids prove without commentary, and show that if they were, in fact, joint and not several, as they appeared, they were a fraud upon the water committee and other bidders. That there must have been some design in practicing this fraud is evident from the fact that without it the parties

would have prepared bids joint on their face; would have presented but one set and in the name of the real bidders. This would have been the honest course, and that which would have been pursued had there been no other object in view than to deal fairly, openly and honestly with the committee. Hoffman & Bates and the San Francisco Bridge Company would have signed their two names to the bids. That would have been fair, open and true. The course they did pursue was misleading, deceptive, fraudulent and false.

The reason for pursuing the course adopted instead of presenting only one set of bids, signed by both bidders, is fully explained by Mr. Bush, who was engineer of Mr. Hoffman, and prepared the bid for manufacturing and laying the pipe upon which the award was made; was with McMullen and Hoffman and heard their conversation and knows what they agreed to, and is the only living witness, except McMullen, (since Mr. Hoffman's death), of what occurred. Mr. Bush is wholly without interest in the matter. He says in substance (R., p. 266-7) that in the various conversations between Hoffman and McMullen it was agreed they should bid together so as to try to get as much work as possible, and it was decided finally that Hoffman & Bates' bid should be lowest, or lower than the San Francisco Bridge Company's bid for manufacturing and laying of the pipes, and the San Francisco Bridge Company's bid should be lower than Hoffman & Bates for furnishing the plates, so that there might be a chance to combine these two bids on both these two items. That *each* would *bid on his own account* and they would share in whatever portions of the work they might be successful in getting; Hoffman & Bates' bid should be lower for the manufacturing and laying and the San Francisco Bridge Company's bid should be lower on the delivery of the plates; that was the day the bids should be opened; that *combi-*

nation they were making to get as much of the work as possible. By combining Lee Hoffman's bid on the manufacturing and laying with the San Francisco Bridge Company's bid on the delivery of the plates, or if there was no bid between that *combination*—the Hoffman & Bates' bid on the manufacturing and laying and the San Francisco Bridge Company's bid on the delivery of the plates—that the San Francisco Bridge Company was to try to withdraw their bid on the delivery of the plates so that the whole work should go to Hoffman & Bates.

Again, (R., pp. 275-6). Mr. Bush says the Hoffman & Bates bid for manufacturing and laying was \$465,667, and the San Francisco Bridge Company's bid on the plates was \$348,781, making the total of the two \$814,448. Now it was understood if that was the lowest total that then they were to make an effort to have Hoffman & Bates's bid on the delivery of the plates accepted, and have the San Francisco Bridge Company's bid on the delivery of the plates withdrawn, which would raise the total they were to receive on the delivery of the plates about \$10,000. The exact total would be \$824,945.80.

This testimony of Mr. Bush shows one of the motives for bidding separately—preparing two sets of bids signed by each firm separately, instead of a single set signed by both, thus necessarily disclosing their joint interest—was that by pursuing the former course they would have a chance to make some *change* after the bids were opened; that the bids could be “manipulated in some way” so as to get more money from the city, whereas to have pursued the other course such a scheme would have been impossible. The first was a fraud upon the committee, the last would have been correct and honest. As it was, they said, now we will so arrange these bids that with Hoffman & Bates' low bid on the manufacturing and laying, and his high bid on the delivery of the plates, the total will be so

much less than the San Francisco Bridge Company's high bid on manufacturing and laying and low bid on the delivery of the plates, that we may be able to "manipulate" the bids so as to get Hoffman & Bates' high bid on the plates substituted for the San Francisco Bridge Company's bid on that item.

This disclosed a motive for appearing under false colors before the committee and the public. It is exactly in line with the remark made by Hoffman in his letter to McMullen dated February 11, 1893, (R., 566), in which he says: "This work will be let to the lowest bidder, no matter who it is, so long as he is responsible. *I, of course, think the bids can be manipulated some way that we could work on the commission after they are opened.*"

Another fact in the record which affords a reason why these bids were put in separately and did not appear to be the joint action of the two bidders, is that it was important that the committee should have good reason to believe that the sum named in the bid of Hoffman & Bates was a reasonable one for the work. The San Francisco Bridge Company at a former letting of the work had been the lowest bidder. Here its bid was more than \$48,000 higher than the bid of Hoffman & Bates for the same work; and upon every other item bid for it was less; less for the plates; less for the bridges; less for the headworks, the evident intention being to impress the committee that Hoffman & Bates' bid on the manufacturing and laying was very favorable to the city.

Another fact tending strongly to show that the course adopted was intended to deceive and mislead is the explanation McMullen gives as the reason separate bids were put in in the name of the San Francisco Bridge Company. From Mr. McMullen's statement it appears that it was known among other bidders and by the water committee that the San Francisco Bridge Company was figuring on

this work, and assumes that a bid or bids would be expected from them, and, so he says, in order to have the public and the committee *believe* that the San Francisco Bridge Company was really a bidder at the letting, the bids which were put in by it, were presented. "It was put in to let other people know that both parties were represented here, as the water committee and the engineers and contractors all knew that both parties were represented here. The higher bid was simply put in to let the name of that firm appear as a bidder, and *we had no interest in it*, and we did not *care* anything about *how much* it was, and by 'we' I mean Mr. Hoffman and myself. *The high bid was put in simply to allow the firm putting it in to be represented at the bidding.*" (R., p. 220). Again, (R., p. 229), McMullen says: "The San Francisco Bridge Company simply put in a bid for the *appearance* of the thing, as I was here, and the company was represented here."

(R., p. 229)—"It was put in simply to *keep the company before the public*, as we were known to have figured on it; it *did not represent anything*; it was simply put in to have it high enough that it would not receive any attention." Could an intended fraud have been more effectually practiced? McMullen says that other contractors and engineers and the water committee knew the San Francisco Bridge Company had figured on the work, and says in effect that these people have good reason to expect them to bid, and in order to mislead them the San Francisco Bridge Company put in these false bids, bids "*in which they had no interest*," bids so high that they "*would not receive any consideration*," and yet neither contractor, engineer nor committee had the least knowledge or suspicion that the bids were not put in as other bids, in good faith, and as an honest representation of what the work could be done for in the judgment of the bidder. It must not be forgotten that these bids, which were intended by

McMullen and Hoffman to be mere shams, to make the fraud more effectual and to give color to their apparent integrity, were each accompanied by a certified check, the aggregate amount of which was no less sum than \$45,000. All this simply *to get the name of the San Francisco Bridge Company before the country* and the *committee* with the appearance of an honest competitor at a public letting, and believed so to be by the public and the committee, but, in fact, a cheat, a fraud, a falsehood, and intended so to be by the parties concerned in presenting them. If it was due to the public, the committee and the San Francisco Bridge Company that it should have appeared as a bidder at that letting, how simple, plain and honest a course was open. All that was necessary was for Hoffman & Bates and the San Francisco Bridge Company to have prepared a set of bids and signed them. "Other contractors," the "engineers" and the committee would then have known in what manner and to what end the two companies had "figured on" the work. The transaction is so far out of the line of the honest, straightforward course which ordinary business judgment would suggest that it is condemned at once by honest men as fraudulent and wicked. The testimony of Mr. Bush shows the motive for the course pursued. McMullen's attempted explanation instead of helping him or them only removes all doubt that the fraud was intentional, and furnishes an apt illustration showing with what consummate skill truth weaves her web about and crushes the rogue who seeks by falsehood to supplant her.

The evidence, then, shows that the averments of the answer above quoted are true.

That while McMullen and Hoffman agreed to be jointly interested in any contract which might be secured from the city, they agreed not to *bid jointly*, but to *bid severally*. Second, that they had a secret agreement that their interests should be joint in any contract which might be

secured with the water committee. That this agreement was not known to the water committee or any of its members, the engineers or to any of the bidders competing at the letting.

This evidence shows that the agreement between Hoffman and McMullen does not bring them within the rule laid down in *Atchison v. Mallon* and invoked by themselves as the rule by which their rights shall be measured, because:

First—Their co-operation was not honest, but was dishonest, fraudulent and for a fraudulent purpose.

Second—As joint bidders they were not public nor avowed, but were secret, deceptive and false.

Third—Although by their secret combination they were to jointly enjoy the profits, no risk was assumed by the San Francisco Bridge Company. The city had no claim upon that company as a result of a joint bid or of the awarding of the contract, although McMullen says in a letter to Hoffman under date of July 22, 1893, (R., p. 554), the San Francisco Bridge Company has assets of the value of not less than \$210,000, of which McMullen owns shares of the value of over \$100,000, yet he not only did not bind himself to the city by bidding with Hoffman upon a bid in which he had a half interest and which he knew there was at least a chance of its being the lowest, but he put in a false bid which he knew could not be accepted. Nor did he so much as sign the bond for \$140,000 which the city demanded as security for the execution of the contract which was awarded and of which McMullen claims to have been all the time a half owner.

The writing signed by McMullen & Hoffman dated March 6, 1893, not a new agreement.

From the foregoing statement it plainly appears that long prior to the 6th day of March, 1893, McMullen and

Hoffman had agreed to act together in securing contracts from and doing work for the city in the construction of its water works, when bids should be again invited; bids for substantially the same work having been invited and received in 1887, but no contracts were let. For the purpose of impressing this point, which we deem of great importance, upon the mind of the court, attention is again called to the evidence touching it.

The complainant's bill alleges that before the time named in the advertisements within which bids were to be received for the construction of said water works, it was agreed by and between McMullen and Hoffman that they would jointly endeavor to obtain the contract for the same or some part thereof, and that in their joint interest a bid should be put in and that in case they were successful they would share equally in such contract as resulted from their bid. That such a bid in their joint interest was put in, in the name of Hoffman & Bates; that it was the lowest bid, and that bid was entitled to a contract for the work it described; that thereupon in "Evidence of the interest had by Hoffman and McMullen in said bid, and the contract with the water committee to be entered into thereon, *and the work to be done thereunder*," the written agreement of the 6th of March, 1893, was signed by the parties. McMullen (R., p. 221) in his re-examination by Mr. Cox, in answer to a question as to when the matter of joint action between himself and Hoffman in regard to the water works first came up, said:

"It first came up several years before this job was awarded, when the bids for building the Bull Run pipe line were taken, I think in 1887, after the San Francisco Bridge Company were the lowest bidders. At that letting Mr. Hoffman came to me and congratulated me, and said that we made a bold, good bid, and that he did not think we knew so much about pipe lines, and said he was sorry it was

not going to go through. Think it was Pennoyer that vetoed the bonds. He said: 'When this thing comes up again, Mac, we must go in together and see if we can't get it.' And we frequently talked during the time that intervened between that occasion and December, 1892, when again negotiations were actively commenced, and it was understood the water committee were going to let the contract early in the spring."

Geo. W. Catt, a witness for the plaintiff (R., pp. 150, 151, 152), in his deposition states in substance (p. 151) that from about 1889 to February, 1892, he was vice-president, chief engineer and had general charge and management of all the business of the San Francisco Bridge Company within the states of Oregon, Washington, Idaho and Montana. After February, 1892, was transferred to New York, and had general charge of the business of the San Francisco Bridge Company on the the Atlantic coast. Soon after Mr. Catt had become manager of the business of the San Francisco Bridge Company in the states named, he says, Lee Hoffman, then proprietor and manager of the business conducted in the name of Hoffman & Bates, approached Catt in reference to the San Francisco Bridge Company and Hoffman's firm joining forces for the building of the contemplated "Bull Run" water works for Portland. Had several conversations concerning such a union of the two concerns for this work. In 1891, Catt and Hoffman journeyed together from Spokane to Tacoma via N. P. R. R. Mr. Catt says:

"During this journey Lee Hoffman and I arrived at a *basis of agreement* by which the *San Francisco Bridge Company should unite with Hoffman & Bates in the construction of the Bull Run water works, in case either of us secured from the city of Portland the contract for building said works.* The *essential point of that agreement was that the work should be executed by us jointly, for the*

joint account of the two companies, and the two companies should share alike in all losses or profits that might result from such contract for building the Bull Run water works. It was a general understanding between us, the details of the agreements being left to be settled when the contract was obtained. This arrangement was often referred to by Lee Hoffman between the time of making of it and the time of my departure for the management of the San Francisco Bridge Company's business on the Atlantic coast. It was also *agreed between Hoffman and myself* that I should make such *investigation as I could in reference to the requisite plant, proper tools, etc., for the manufacture of steel water pipe.* As a result of this I did make some *investigation* during the year 1891 by corresponding with manufactories of tools, etc.; also visited the Albion iron works of Victoria, B. C., which was at that time manufacturing some pipe of this character. *I advised the San Francisco Bridge Company at San Francisco, through Mr. McMullen, of this arrangement with Lee Hoffman, and when the work was advertised for the city of Portland in 1893.* In making my estimates for the work mentioned I addressed some of them to *Mr. J. McMullen and Hoffman & Bates jointly.* The agreement was that J. McMullen should collect what information he could at San Francisco, Cal., with the assistance of the engineering force of the San Francisco Bridge Company there concerning the proposed work. He was to take such information with him to Portland, Or., where he would meet with Lee Hoffman, who would have secured such information as he could on the same subject, modified by his more accurate information of the local conditions, and that what information I could secure by investigation in the East would be forwarded to *Lee Hoffman and J. McMullen, of Portland, Or.,* and that after they had made a comparison of all informa-

tion collected they should agree upon the amount to be bid for the work jointly."

This testimony alone shows beyond any question that the writing signed by McMullen and Hoffman on the 6th day of March, 1893, and made the basis of this suit, was not a new agreement, made at the time of the execution, but was simply the settlement of the "detail" of a general agreement entered into more than two years before, and in pursuance of which all the work of procuring the contract had been done. This testimony shows beyond controversy that all the work done by either party in securing this contract with the city was in pursuance of and part performance of the agreement between them to act jointly in securing it, and "doing the work for the joint account of the two companies, and the two companies should share alike in all losses and profits that might result from such contract." This deposition (R., p. 153) shows what other work was done in pursuance of this agreement and prior to the execution of plaintiff's Ex. No. 1, to which the attention of the court is respectfully invited.

The testimony of Mr. McMullen is altogether in harmony with Mr. Catt, for he testifies (R., p. 171) in substance that whatever consultations he had with Hoffman relative to procuring the contract from the water committee was with a view to McMullen and Hoffman *performing the work together in case they secured the contract*.

Again, (R., p. 173), the following question was asked McMullen:

Q. Then while you and Mr. Hoffman were working together and preparing the bid, you had no expectation that if awarded to Hoffman & Bates you would be a partner to the execution of the work?

McMullen answered: "Certainly I had expectations, decidedly. All the correspondence for three months prior

to that will *show that it was mutually agreed that we should be partners.*"

On the same page he further says that while Hoffman and himself were figuring together and preparing the bid for manufacturing and laying the pipe they not only expected *to be partners in doing the work, but they had agreed to be.*

(R., p. 174) McMullen says: "It was agreed before the award had been made that we were to be partners. Now after the award was made this paper (Ex. No. 1) *is the identical agreement that we mutually assented to*—it was reduced to writing in Mr. Hoffman's attorney's office, and we both signed it."

Again, (R., pp. 174, 175), when McMullen and Hoffman were figuring upon a bid for manufacturing and laying the pipe for the Bull Run water works we had a *verbal agreement* to be partners, a tacit understanding, as our correspondence will show.

"We *bid for it* with the idea of getting *the contract* and *doing it if we got it.*"

Hoffman and McMullen together *as partners.*

Again, (R., p. 193), McMullen says: "Let me say, it was the same as *that we contributed before the signing* of the agreement and contract which made it successful."

Again, (R., p. 212), McMullen says: "Whatever was done prior to the signing of the partnership agreement, it was in the *same condition as the job* was secured; the submerged pipe in our negotiations with each other was in the same status as this relating to the pipe lines proper."

(R., p. 225) McMullen was asked:

Q. How much time was given by these gentlemen to this work, approximately?

A. All the time from early in January, 1893, to the letting of the contract, and after the letting of the contract

a very large portion of their time and my own time until the job was well under way, at the end of July or August, 1894.

(The parties whose time was employed as stated in the preceding answer of McMullen were, as he claims, Mr. Catt, Mr. Krusi and Mr. Wood, all civil engineers, all in the regular employ of the San Francisco Bridge Company). (R., p. 225).

(R., pp. 185, 186), question to Mr. McMullen: "I will ask you to state if the work you did on your part in carrying out this work did not consist in consulting Wolff & Zwicker and Risdon and others about the best way to arrange your plant, and have the business carried on—excavating the ground and laying the pipe and so forth."

A. "I did considerable of that character of work."

Q. "Was that not chiefly what you did?"

A. "No."

Q. "What was your chief employment?"

A. "Well, I think the principal thing that we did, or one of the principal things which every contractor will recognize as the principal thing, was to get the job."

Mr. McMullen says (R., pp. 229, 230, 231) that he made no charge against Hoffman & Bates for the services of Mr. Catt, whose salary was \$5,000 per year, nor of Mr. Krusi, whose salary was \$3,600 per year, nor of Mr. Wood, whose salary was \$2,100 per year, which were rendered by them, beginning in January, 1893, and continuing four or five months; (two months of this time was before the writing Ex. No. 1 was executed); that the services of these men, as well as his own time and services, were his contribution to the enterprise for which he expected to be *paid out of the profits*, if there were any. (R., p. 231).

From all this evidence but one conclusion can be reached, and that is that McMullen and Hoffman agreed together to build the Portland water works or some portion thereof,

if they could secure contracts or a contract. That their agreement was that they would unite to get the contract and do the work, each paying half the expenses and each to receive half the profits or bear half the losses, as the venture should prove successful or otherwise. The object of the combination was to make profit out of any work they should get. There could be no profit if no contract was secured, and therefore no necessity existed for any steps being taken to preserve the agreement they had entered into, but after they had performed their agreement so far as to secure the contract, and all doubts were removed on that point, and the basis was laid for earning profits, then they reduced the agreement to writing for the purpose of "evidencing the interest" they respectively had in it.

If the allegations of the bill relating to McMullen's interest in the bid, the award and the contract are true, it is very certain that he had no greater or different interest in the contract after Ex. No. 1 was executed than before; and his interest would have been exactly the same if Ex. No. 1 had never been signed. His right rested upon the agreement entered into between himself and Hoffman long before the contract with the city was awarded or any efforts to secure it were made.

It is not claimed that the writing signed by McMullen and Hoffman granted to or conferred upon McMullen any right or property he did not already own; but he says it was executed for the purpose of "evidencing" a fact which did not appear on the face of the bid, but which existed nevertheless, viz.: The joint interests of Hoffman and McMullen in the contract which had been awarded. McMullen himself does not pretend that the agreement granted him anything he did not already own, but merely recognizes what he had in his own right, a right which the testimony above quoted shows that he claimed to have earned in his efforts to aid and assist in procuring

the contract. Having entered into an agreement to perform as much of the work of constructing the Portland water system as they could secure contracts for, the first thing for them to do was to get the contracts. The work was to be let upon sealed bids. The public was invited to bid and was notified that the lowest bidder would get the contract. This was known to McMullen and Hoffman. They knew that the work was to be let in distinct divisions, and that others than themselves would bid; that there would be competition. Knowing these facts they prepared bids in which they secretly agreed to be jointly interested.

Hunter v. Nolf, 71 Pa. St. 282.

Sharswood, J. (p. 284): "It is an undisputed fact that Hunter and Nolf, both being applicants for the office of assistant assessor of the United States, it was agreed between them that if Nolf should withdraw and Hunter receive the appointment, they would jointly perform the duties, and equally divide the receipts. It is undisputed law that such a contract is illegal, against public policy, and cannot be enforced." It was claimed by the plaintiff that after the original contract was entered into, under which the appointment was secured by Hunter, and after it was secured, a new contract was made between himself and Hunter, upon which the present action is based, and that the new contract was not tainted with the illegality which rendered the original void. Upon the point the court says: "If there was a new contract it was certainly precisely the same in its terms as that made before the appointment. Nolf himself was examined as a witness, and throughout his testimony insisted on the original contract. 'We had,' said he, 'a regular contract. Our regular contract was this: "He offered me, if I would help to do the regular business, he would give me half; this was spoken of before and after he had the appoint-

ment." Does it in the least degree shake this testimony that Nolf testified, 'Joseph, in the month of October, 1866, employed me to make assessments,' or that Captain Stollzenback testified that Hunter told him "he had employed Nolf to assist in making assessments?" Even if there had been an express contract on entirely different terms than those agreed upon before, it ought to be viewed with a considerable degree of suspicion as an attempt to evade a sound and salutary rule of public policy, but here there is no pretense of any other or different contract. The payments made under it, as it clearly appears, were in accordance with its terms—not a *quantum meruit*, but one-half the receipts. . . . How can it be pretended after such testimony by the party himself that there was any evidence of a new and different contract? A mere confirmation of the old one could not, certainly, cure the vice which was inherent in it. It would practically annul the principle to so hold."

This case is almost identical with the case at bar. Substitute the procuring of a contract from the Water Committee for an agreement between Hunter and Nolf to secure to Hunter the appointment of assistant United States assessor, and the cases are alike. Hunter and Nolf agreed that Hunter should hold the office; that they should perform the work together and divide the receipts equally. This contract was illegal and void. Nolf sought to avoid the illegality by showing a new contract to do the very thing they had agreed to do before Hunter was appointed. McMullen and Hoffman agreed to unite their efforts to secure the contract with the city and to perform it and to divide equally any profits which might result. They took the contract in the name of Hoffman & Bates. Then by a writing by which they merely confirmed the old contract, they claim to have made a new agreement. The methods adopted by them in executing so much of their

original agreement as was required to secure the contract with the city were unlawful, and rendered that agreement void. Now, it is claimed that by reducing so much of the original agreement to writing as had not been executed in procuring the contract with the city, and signing their names to it, they have made a new contract purged of the illegality of the old one, and ask the court to enforce it. By this proceeding McMullen claims to have evolved a new agreement, and to have thereby cured the vice which is inherent in the old. The evidence offered by the plaintiff and quoted at some length in this brief shows plainly that the agreement of March 6, 1893 (Plff. Ex. 1), was a mere reducing to writing of an agreement entered into long before the writing bears date.

McMullen and Hoffman combine, not as honest bidders, but to prevent competition.

That the court may fully understand the spirit in which McMullen and Hoffman determined to make the building of the city water works at Portland an occasion out of which they should profit, and the means they proposed to adopt to effect that object, attention is called to some of the correspondence between them before the contract was let. As I read this correspondence it breathes nothing but schemes of fraud and deception and dishonesty. It imputes to men, to companies and to the water committee nothing but the basest motives and refers to them as though these persons were ready and anxious to deal with them only upon false lines.

The earliest letter in this correspondence which appears in the record is that of McMullen to Hoffman dated January 31, 1892, (R., p. 518). This letter assumes that the water committee is a mere tool of the Oregon Iron & Steel Company, a manufacturing corporation at Portland, Or. McMullen says: "If the Oregon Iron & Steel Company

can prevail on the commission to adopt cast iron it would virtually create a monopoly for them, as they are the only ones there who make cast-iron pipe, and the Risdon people tell me that they can make it there in Oregon *cheaper* than one can import it from the East. As you are acquainted with all the water commissioners and have *social* and *business* relations with many of them, I think you are in position to *counteract* this movement, and if we are to *make anything ultimately out of the job*, it will be necessary to *knock* out this *scheme*. Get in and do what you can to beat it. I understand the Oregon Iron & Steel Company has a *big pull* on the commission. What you do must be done at once, as I understand they are to determine the matter at a meeting to be held next Tuesday."

Two points are of interest in this letter. First, that the Oregon Iron & Steel Company can make pipe cheaper than any one else, and for that reason steps must be taken to keep that company from furnishing it. If this does not succeed McMullen and Hoffman will make no money ultimately out of the job; and, second, that the committee is corrupt and the tool of the Oregon Iron & Steel Company.

On January 22, 1893, Hoffman writes McMullen (R., p. 563): ". . . Now, Mac, this is a pretty large contract and requires a good deal of capital, and I think we ought to *put up* some kind of a *combination* on it. I do not care to have this contract all alone, and I was thinking it would be a good plan if you, Risdon Iron Works, Wolff & Zwicker and myself would go in on it together and take the work. I am willing to go in with you alone on the contract, but both the Risdon and Wolff & Zwicker are strong teams, and I think if we would *combine* we could take the contract *and make* more out of it than if *any one* went in by themselves. If you think favorably of this plan, you see the Risdon people and I will see Wolff. Let me know at your earliest convenience just how you feel about this. The only people I fear up here is Wolff

& Zwicker, and I think if we *combine* this way we would have a very strong team.

Now, Mac, I don't think we will be able to *put up a pool on this work* unless we could take in the O. I. & S. Co., and I doubt it very much if they would come in; of course, if we found out that we could *put up a pool on it, each one of us could go in separate*. McMullen & Hoffman did "put up a pool" and then went in 'separately.'

The next letter in the series is from *McMullen to Hoffman, dated Jan. 26, 1893* (R., pp. 519-520). A few quotations from the letter will show its character and spirit. "From correspondence that I have seen between the Risdon and Wolff & Zwicker, I am satisfied they are pretty intimate, and that they will pull together in some form. Now, I do not think they will *take us in*, unless we *convince* them that we are going to make a hard bid for the work. Do not let them know that you do not want the job! . . . I think that we could do better by *making them buy us off*. The Risdon is a large, wealthy and four-handed concern, and they will make a hard fight for this job. I think that *we bid so hard on the job before*, that if they think we are going after it *on the same lines again*, they will be disposed to *capitulate with us*. I think that we ought to make Wolff & Zwicker understand that you and I are together, and that we are going to hit the job hard; then if they make *satisfactory inducements* when the time comes *we will quit*." . . . "If they" (the Risdon) "think they can throw you and me overboard, they will do it in a minute, so I do not think we ought to talk partnership at all; on the contrary, talk 'get the job,' then if they are *afraid* of us, they will *buy us off*."

"Perhaps the O. I. & S. Co. could be *gotten out of the way* by *giving* them the *cast-iron* work, as I do not think the Risdon could compete with them on that portion of the work; yet the O. I. & S. Co. might get a *better price* for that portion of the work if the *Risdon* and *us* should *agree* to let them alone on it, *on the condition* that they let the *wrought-iron part* of it *alone*." (R., p. 521.) "I think that we can arrange it in some way so that we can make some money out of it."

Again on *February 8, 1893*, McMullen writes Hoffman

(R., pp. 522-3): "We will have to make the Oregon Iron & Steel Co. know, when the time comes, that if they *do not quit* and *let go on everything* except the *cast-iron*, that we will hit them hard on the cast-iron and make it *rocky* for them, as I understand from interview with Eastern cast-iron pipe men, who have agents here, that they can put that cast-iron down in Portland cheaper than Portland men can make it, and better, too." "I think you ought to ascertain (off-hand, and without apparently caring to know) just what the O. I. & S. Co. do want in the job, and whether they will be *satisfied* with the *cast-iron* or not, and *how far* you think the *committee will go to favor them*. If the wrong man should be the low bidder, do you think they would readvertise the job over again to knock him out? I expect you to *know all about* this *very important* part of the *business* when I get up there."

Referring to the submerged pipe, for which a bid was put in at the letting on the 1st of March, 1893, by the San Francisco Bridge Co., but the contract was not then let, *McMullen says to Hoffman in a letter written March 8, 1893* (R., p. 526): "I wish you would see your friends on the committee, and see if you cannot get them to reconsider the submerged pipe proposition, as I believe that we have at least \$20,000 in that. If it is advertised again, it might be possible that we would get left; if we should, however, at the first bidding, do you not think we could get it readvertised again—so as to give us another chance at it? I think you will have *pull* enough with the *committee* to do this. If you cannot get it awarded on the present bids, I am in favor of looking after it very closely when it does come up again, and be in touch with every one who makes inquiry about it relative to *bidding* and *taking them in and getting a good price for it*. If we can do this, I believe it can be *gotten* the next time *with more money in it than there is now*, for the reason that the wrought-iron pipe will be cheaper than the cast-iron pipe. I hope you will keep a close watch on this, and advise me promptly, and if any Eastern men should go for it the second time, we will have *Mr. Catt look after them and take*

them in, and you can look after any one up there, and I will look after any one down here. The Risdon will probably have to get a little something out of it."

In his testimony (R., p. 214), speaking of the subsequent letting of this submerged pipe contract, Mr. McMullen says: . . . "I don't think that I was in Portland at the second letting. I think I furnished Mr. Hoffman what *data* and *information* I had relative to it, and I relied on him to put in the bid; that is my present opinion.

"I don't think it is a fact that Hoffman notified me that he would have nothing further to do with manufacturing and laying the submerged pipe.

"Don't think it is a fact that I put in a bid for this work on my own account."

I quote here portions of what *Mr. McMullen wrote to Hoffman on August 4, 1893*, shortly before the second letting of the submerged pipe contract, for it seems to fit so completely the evidence of the letter of February 8 and his own testimony, and to show with such peculiar force the spirit which moved these parties in their struggle after contracts for this work. (R., p. 557): . . . "I do not want to let go the submerged pipe; want to get the job; I think we can make \$25,000 on this job, but we must *pool* it; to do this, we will have to let the secretary, Frank T. Dodge, in, and if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened, and we will gather in everybody that is personally represented; don't think there is many." (R., p. 558.)

. . . "Another thing, Lee; you want to see Smith & Watson and see that they do not form any combination with any one *else* to bid on this work; *take them in* by giving them the *cast-iron*, and hold them down to about what it is worth." . . . "I think you can arrange to get Dodge into our camp."

On their face the bids of McMullen and Hoffman were, as against each other, competing. That they were not so in fact was a *secret* known only to McMullen & Hoffman

and their employees. The San Francisco Bridge Company said by their bid that \$514,664 was the smallest sum for which a contractor could with reasonable safety undertake to manufacture and lay the steel conduit from Bull Run river to Mount Tabor. The committee so understood it, and when they saw that this company, which had been the lowest bidder before, was underbid by Hoffman & Bates \$48.997 on this single item, the committee must have regarded the bid of Hoffman & Bates exceedingly favorable for the city. But McMullen and Hoffman knew all the time that \$514,664 was a mere *fake* and great fraud, and was intended for no other purpose.

In passing upon the plaintiff's exceptions to the answer, the learned judge of the circuit court used this language upon the feature of the case: "But when the parties presented themselves as competitors for the work they were guilty of a fraud; the tendency of what was thus done was to cause the Water Committee to believe that the bid of the defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee that in plaintiff's opinion the work could not be profitably done for less than a figure \$35,000 higher than that bid by defendant, although as a matter of fact plaintiff believed such work could be done, and, except for the collusive agreement, defendant would have offered to do it for an amount \$75,000 less than that at which the contract was let." In summing up the opinion, the court says: "Upon all the cases cited and to be found, and in any view of the case consistent with public policy and the principle of equity, there can be no relief in such a case." But it is due to the court and to the case to say that on the final hearing the judge repudiated this conclusion as unsound, and in so doing, in the light of the authorities he so carefully considered and digested in his former opinion and without citing one as a basis for the change, makes use of the following most astonishing statements: "There was nothing to criticise in what was done by the parties, unless their conduct in presenting a second bid in the name of the San Francisco Bridge Company operated as a fraud

on the committee. When this matter was considered on the exceptions to the answer, I was of the opinion that this was the effect of the second bid. It appeared from the pleadings that the profits from the contract at \$465,667 amounted to nearly \$140,000, and it seems a necessary inference that a bid by a company such as the one in question, based presumably upon careful estimates to do the work for \$514,664, influenced the award that was made. But this view cannot be sustained. *An attempt to deceive must be successful in order to operate as a fraud.* If the second bid in this case was in effect a misrepresentation made with a fraudulent intent, it must, in order to avail the defendant, appear to have been acted upon by the committee—to have influenced their action to the public detriment.” However reprehensible the act of the parties was in making the second bid, there is no presumption of fraud arising from it, and it does not appear from the evidence in the case that the Water Committee was in any degree influenced by it in awarding the contract.” Every court before which the question here decided has come, from the earliest days of English jurisprudence to the hour when this decision was rendered, has in the plainest terms possible held exactly the opposite of this doctrine to be true. It seems to have been reserved to the learned judge who delivered this opinion to overrule the whole of them, without a single case ever decided by any court to support him. I note here the following cases which will be considered more fully later on:

Atcheson v. Mallon, 43 N. Y. 147.

Doolin v. Ward, 6 John. 195.

Wilbur v. How, 8 John. 443.

Swan v. Charpening, 20 Cal. 182.

Gullick v. Ward, 5 Halst. (10 N. J. Law) 87.

Thompson v. Davis, 13 John. 112.

Greenhood on Public Policy, p. 178.

Holliday v. Patterson, 5 Oregon, 177.

Richardson v. Crandall, 48 N. Y. 348.

Gibbs v. Smith, 115 Mass. 592.

Engleman v. Skrainka, 14 Mo. App. 438.

Woodruff v. Berry, 40 Ark. 251.

Jenkins v. Frank, 30 Cal. 586.

Hunter v. Pfeiffer, 9 N. E. 124.

Many other cases.

The evidence shows that the price finally agreed upon by McMullen & Hoffman and expressed in the bid put in by Hoffman & Bates was not honestly arrived at, but was raised \$45,000 higher than McMullen would have bid but for the combination with Hoffman, while the bid put in by the S. F. Br. Co. was raised, as alleged in the answer, over \$98,000 above what McMullen declared he regarded as a *perfectly safe bid*. Mr. McMullen said a bid based on Catt's estimate would be a safe bid. (R., p. 276.)

Mr. Bush says (R., pp. 265-266): "He, McMullen, brought a lot of papers in the office, and showed them to me, and said they represented the result of researches on the Bull Run pipe line, and that these were estimates from New York, and also from the San Francisco office."

There were estimates made by Mr. Catt, going into all the details, and the cost of the job, plant, tools, etc. . . .

Mr. McMullen said the estimates were Catt's.

Mr. Catt's estimate for the manufacturing and laying was \$416,038. (R., p. 268.) The estimate Mr. McMullen brought here of his engineer, Mr. Catt, was all ready to be submitted as a bid. It required no additional figures. McMullen said the bid prepared by Catt was a perfectly safe bid; that Catt had gone over everything very thoroughly; that the reason he did *not put in that bid* was that he thought he could get *more money* out of the job. Hoffman was always skeptical about doing the work for so little money, and kept on trying to have the bid increased.

(R., p. 281) Mr. Bush says the aggregate estimates at which he arrived, upon which a bid might be predicated for all work in connection with the manufacturing and laying

of the steel conduit from the head works to Mount Tabor, was \$420,257.00 That this was afterwards raised to \$479,167. Hoffman told me to raise it. Hoffman and McMullen talked the thing over that there ought to be more profit in it. The object in making the raise was to increase the bid. They thought it was *safe* to increase it.

(R., p. 282) The bid was not raised in consequence of advices they were receiving from time to time in regard to the matter. It was simply a question of the *amount* of *profit*.

This testimony shows that *McMullen*, at any rate, regarded the estimate of Catt, \$416,000, as a safe sum for which the contract might be taken. There is no reason to presume that, but for his combination with Hoffman, he would have put in a bid for that sum. If he had pursued his former tactics of putting in a "bold, hard bid," it would have been for \$416,000 instead of \$514,000, \$98,000 more than he thought the work could safely be done for. He not only increased his own estimate from \$416,000 to \$514,000, but he joined with Hoffman to increase Hoffman's bid from \$420,000 to \$479,126, an increase of \$59,000. How could competition be more effectively destroyed? Much credit is claimed for McMullen because he urged this bid of \$479,000 to be reduced, and did cause \$13,500 to be deducted, reducing it to \$465,667, as finally presented. The inducement to this reduction does not show that the bid of \$479,126 was the honest result of the judgment of McMullen & Hoffman, as to the sum the work could be done for. Mr. Bush says it was cut off at the very last hour. (R., p. 266.)

McMullen came into the office very much excited, and said he had made up his mind that "we were too high and that we had got to take off something." We took off five cents a yard on the item of excavation; this amount is 270,000 yards at five cents a yard, amounting to \$13,500.

References by his counsel to this act on the part of McMullen, at former trials, would lead one to suppose that McMullen's conscience had suddenly smitten him with the conviction that too much money was to be demanded from the city, and he had been impelled by a high sense of moral duty to hasten with all speed and have the bid reduced before it was "everlastingly too late." This is presented to show how tender McMullen was of the interest of the city. But Mr. Bush gives a reason which crushes this idol, and shows the plain truth of the matter. (R., p. 298) Bush says: "McMullen came in in a somewhat excited state of mind about an hour before the bids were submitted, and insisted upon the bids being reduced. The reason he gave for it was that *he had sized up some of the other tellows' bid.* He said *Mr. Wakefield's.* He said, '*We have to come down, or we won't get the job.*' *That was the reason why it was reduced.*"

Mr. Bush says it was thought that by reducing the bid \$13,500 *they would get below Wakefield.*

This circumstance shows plainly enough that the bid \$479,126 which McMullen and Hoffman had agreed upon was not made in good faith; was not an indication of what they thought the work could be done for with a reasonable profit. If the bid had been prepared upon that basis, McMullen would not have insisted on throwing off \$13,500 at a single dash, and evidently only limiting the reduction to that sum because he had reason to think from what he had heard this would reduce the bid below *Wakefield.* The testimony shows that McMullen and his engineers had made very careful estimates of this work, and had decided that it could be safely done for \$416,000; that what was added above that sum was the result of the combination with Hoffman. The amount added in the first instance to the bid agreed upon was \$63,000. It was perfectly safe in the judgment of McMullen to reduce this

sum \$13,500, for that would still leave \$49,500 more money than he thought necessary to make a safe bid. It is manifest that but for the combination with Hoffman, McMullen's bid, instead of being \$514,664, as it was, would not have exceeded \$420,000, for it will be remembered that McMullen prides himself upon being what he calls a "bold, hard bidder" in such contest. This removal of McMullen as a competitor was not the result of a joint purpose of himself and Hoffman, honestly conceived and publicly announced, to secure contracts for work from the Water Committee, but was the result of a design to suppress competition, while pursuing a course of action intended to impress the committee and the public that they were in fact competitors. The true character of this proceeding is very forcibly and clearly stated by the learned judge who delivered the opinion upon McMullen's exception to the defendant's answer (R., p. 70):

"But when the parties presented themselves as competitors for the work they were guilty of a fraud; and the tendency of what was thus done was to cause the Water Committee to believe that the bid of the defendant was a favorable one for the city. Moreover, plaintiff's **pretended** bid had the effect of a representation to the committee that in plaintiff's opinion the work could not be profitably be done for less than a figure \$35,000 higher than that bid by defendant, although, as a matter of fact, plaintiff believed such work could be done, and, except for the collusive agreement with defendant, would have offered to do it, for an amount \$75,000 less than that at which the contract was let." It is true that this opinion was rendered upon exceptions to the answer, and before the testimony was taken; but quotations from the testimony in the record, set out in this brief, show that in all material particulars the averments of the answer are true, and the remarks of the court quoted apply with equal force to the case made by the evidence.

The contract with the city, as well as the agreement between McMullen and Hoffman, by which it was secured, are indissolubly connected, are against public policy and void.

The contract of March 10, 1893 (R., p. 118, Stipulation of Evidence, Subd. 3), between the Water Committee and McMullen and Hoffman and in the name of Hoffman & Bates, was obtained by means so false and fraudulent that it cannot have the aid of the law to enforce it, as authorities hereafter to be cited show beyond question. The evidence shows this contract to be the result of an agreement between the San Francisco Bridge Company, or their representative, on one side, and Hoffman & Bates on the other. That this agreement was entered into long before the contract of March 10 was executed, and was entered into for the special purpose of securing the contract and performing the work. The agreement was one and indivisible. That the contract of March 10 was the direct product of the agreement to secure and perform it, if secured. That the means agreed upon were fraudulent, and they were carried out as agreed. After the combination was formed, the plans laid, and so far executed as to have secured the contract, then, for the first time, McMullen and Hoffman reduced to writing so much of their original agreement as remained to be performed. They entered into no new agreement. In this writing, special mention is made of what had already been done as a part of the undertaking, and this is made for the purpose of showing what was claimed to be McMullen's interest, not to convey a new one. The agreement of McMullen and Hoffman, and the contract of March 10, are indissolubly connected. The acts required to perform one necessarily fulfill the demands of the other. The provisions of the contract of March 10 on the part of the Water Committee define the duties imposed and intended to be imposed upon

themselves by McMullen and Hoffman in their original agreement, afterward reduced to writing. If one of these contracts is void, the other is necessarily so.

The contract of March 10 is void as the *result* of the frauds practiced by McMullen and Hoffman to obtain it; certainly for a much stronger reason, the contract between the same parties to practice the fraud which brought about the *result*, and then to profit by it, must be more plainly void. If McMullen and Hoffman could not have the aid of the court to enforce the contract of March 10 against the city, certainly they cannot have such aid to enforce the same contract, or another based upon and growing directly out of it, between themselves.

Agreements the natural tendency of which is to prevent competition in sales at auction or lettings upon sealed bids, are contrary to public policy and cannot have the aid of the courts to enforce them.

In all sales by public auction, in all public lettings upon sealed proposals, where competition is involved, the public has a direct interest, and courts watch all such proceedings with jealous care, and, if they are found tainted with fraud, refuse to countenance or support them. This class of cases forms a distinct and independent class, which the rule of law just stated controls. This rule is so well established, is of such long standing, that in its application it is independent of and uninfluenced by rules applicable to contracts made by private parties in violation of some statute or rule of common law; contracts which are unlawful because forbidden, and involving no question of public policy beyond the single fact that a law has been violated. The rule in this class of cases does not apply to the class first named. In this case the evidence shows that the design of the combination between McMullen and Hoffman

was to prevent competition in bidding, and it also shows that the city was in fact a sufferer to the amount of many thousands of dollars. But it is not necessary, in order to make defenses of this character available, to show that the parties *intended* to injure the public or that the public was in fact injured by the course adopted. All that the law requires is that it appears that the natural tendency of such an agreement is to injuriously influence the public interests. The principles of law which seems to me ought to be controlling in this case are stated by the court of appeals of New York in the case of *Atcheson v. Mallon*, 43 N. Y. 147. An act of the legislature of New York authorized the board of town auditors to receive sealed proposals for the collection of the taxes of that town, and award the collection thereof to the person offering terms most favorable to the town. The board advertised, and among others Atcheson and Mallon each put in proposals. Their proposals were seen by both the parties before they were sent in, but it did not appear that any change was made in either of them in consequence of the knowledge by one bidder of the proposal of the other. At the time the proposals were sent in to the board of auditors, Atcheson and Mallon agreed that, if either obtained the award for the collection of the taxes, both should share equally in the profits and be liable to an equal share of the losses. The contract was awarded to Mallon, who collected the taxes and made a profit of \$400. He refused to divide with Atcheson, and to compel him to divide this suit was brought and there was a verdict for the plaintiff for \$200. Judgment for plaintiff. On appeal to the general term, the Supreme Court reversed the judgment and ordered a new trial.

Folger, J., delivering the opinion of the court of appeals, affirming the decision of the general term, says (p. 149):

"It is not necessary, for the determination of this case, to inquire whether the effect of the agreement between the parties was in fact detrimental to the town of Oswagatchie. The true inquiry is, Is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is that agreements which in their necessary operation upon the action of the parties to them tends to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy, and are void."

After discussing the general tendency and necessary effect of such contracts upon the public interests involved, the opinion says of the facts disclosed by the record in that case: "It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce."

The opinion then proceeds as follows: "Perhaps there is nothing in the statute which would have prevented the parties from making an *avowedly joint proposal*. Though the language of the second, third and fourth sections, and the analogy of the laws for the collection of taxes, contemplate but one person as town collector. But a joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are *public* and *avowed*, and not *secret*. The risk, as well as the profit, is joint and *openly* assumed. The public may obtain at least the benefit of the joint responsibility, and the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid."

This case is decisive of the case at bar. If Atcheson could not recover on the case he made, certainly McMul-

len cannot upon the facts disclosed by this record. Let them be compared:

1st. Atcheson and Mallon exhibited to each other the proposal he was about to submit.

2d. McMullen and Hoffman did the same.

3d. No change was made in the proposal of either Atcheson or Mallon after the contents were made known to the other.

4th. The proposals presented by McMullen and Hoffman were repeatedly changed as the result of the combination and knowledge each had of the other's bid, and the estimate of McMullen's engineers, which he repeatedly declared he regarded as a safe bid for the work, was, as a result of this knowledge, increased from \$416,000 to \$514,000, and that of Hoffman was increased, with McMullen's consent, from \$420,000 to \$479,000, and was then reduced at the instance of McMullen and with the consent and concurrence of Hoffman to \$465,000.

5th. The contract between Atcheson and Mallon for a division of the profits, if a contract should be awarded to either, was made before the proposals were deposited with the board of auditors, and no writing was signed afterward.

6th. The contract between Hoffman and McMullen for the division of the profits in case a contract should be secured was made before the proposals were presented to the Water Committee, and after the contract had been awarded McMullen and Hoffman reduced to writing the agreement, by and under which the contract was secured and the work was to be done.

7th. The agreement between Atcheson and Mallon was *secret*, and was unknown to the board of auditors.

8th. The agreement between McMullen and Hoffman was secret and was unknown to the Water Committee.

9th. The money earned for collecting the taxes was paid over to Mallon; the contract with the town was fulfilled and the transaction was finally closed.

10th. When this suit was commenced, neither the contract with the city nor the agreement of McMullen and Hoffman had been performed; only a part of the money earned had been paid over.

11th. Atcheson sued Mallon for money in his hands in which Atcheson had an undivided half interest if the contract between himself and Mallon was valid; he simply asked the court to require Mallon to pay him what was claimed to be due and in the hands of Mallon, on a completed contract.

12th. McMullen seeks a decree to have the unearned profits of a contract divided; he asks for a receiver to complete the contract with the city and the agreement with himself and Hoffman, and he prays an injunction to prevent payment to Hoffman of the money due and to become due on the contract.

The principle laid down in *Atcheson v. Mallon* is applied in *Doolin v. Ward*, 6 John. 195. This was a sale of goods at auction, in which Ward agreed not to bid against Doolin, for certain goods both wanted, provided Doolin would divide the goods equally when purchased. To this Ward agreed. Doolin purchased the goods and refused to divide. Ward sued to recover his share, and recovered in the lower court. The judgment was reversed on appeal. The court held that the contract declared on was without consideration and void. It was also against public policy and tended injuriously to affect the character and the value of sales at auction."

Wilbur v. How, 8 John. 443.

A job for making a road was set up at auction and it was agreed between the plaintiff and defendant that if either of the parties should bid off the job, it should be di-

vided between them. Wilbur bid off the job and refused to divide. How sued Wilbur and recovered a judgment for \$20.

On appeal, the court of errors reversed the judgment. "Held, that the case comes within the principle laid down in Doolin v. Ward. That the contract was nudum pactum and a fraud on the vendor." It should be observed that in this case it does not appear that the parties ever saw each other's bid.

Sharp v. Wright & McDonald, 35 Burt. 236.

The parties to this suit were bidders at a public sale of the Albany bridge. Wright & McDonald were the lowest bidders. They sold out to Sharp, who was next lowest; were paid \$1500 and given nine promissory notes by Sharp. They exposed the fact of their sale to Sharp, and the result was that Sharp did not get the contract on his bid. He claimed that his failure was the result of Wright & McDonald's exposing the fact of the sale to him, when, as he claims, they agreed to assist him in getting the contract and the money was paid and the notes delivered with the understanding that if he failed to secure the contract the money was to be refunded and the notes were to be delivered up. Sharp sued to recover the \$1,500 and to have the notes surrendered or the collection of them enjoined. It was held that there could be no recovery in such a case.

Leonard, J., p. 238: "It is against public policy to uphold such a contract. It does not help the plaintiff's case that the defendant failed to observe the rule of 'honor among thieves.' The plaintiff cannot insist that he has been a victim because the defendants disregarded that rule, and that he is exempt from the application of the maxim, '*potior est conditio defendentis*.'"

Clarke, P. J., says: "The parties are clearly *in pari delicto* in the commission of an offense not only *malum prohibitum* but *malum in se*; and in relation to parties so situated the law unhesitatingly and invariably says: First, whenever they have fraudulently or illegally contracted to

do a thing, it refuses to enforce the execution or to award damages for the non-execution of such contract; and second, whatever they have executed, it refuses to lend its aid to either party to disturb."

People v. Stepheus et al., 71 N. Y. 527-546.

This case grew out of fraudulent combinations of bidders for contract to make certain repairs to the canal.

At p. 546, Allen, J., speaking of sales by public auction, uses this language: "The general rule is that a purchaser at an auction who uses unfair means to prevent competition cannot hold the property. These general principles are not questioned, and are uniformly sustained by the courts."

Swan v. Chorpening, 20 Cal. 182.

This case relates to the letting of contracts upon sealed proposals to carry the United States mail. Chorpening was a mail contractor, as was also Swan. Chorpening proposed to bid for a contract to carry the mail between Placerville and Salt Lake City. Swan proposed to bid for that part of the same route between Placerville and Carson Valley. Swan withdrew his bid in pursuance of an agreement with Chorpening that if he secured the contract he would either divide the contract price of carrying the mail between the last-named cities or would pay Swan a gross sum equivalent to such proportion. Chorpening secured the contract, and carried the mail, but refused to keep his contract with Swan. Swan sued and recovered a verdict for \$30,000, upon which judgment was entered. An appeal was taken to the Supreme Court.

Cope, J., at p. 184, says: "This suit is upon an agreement entered into in fraud of the policy of the government in respect of the mode of providing for the transportation of the mails. Contracts for that purpose are required to be awarded to the lowest bidder, and any agreement tending to deprive the government of the advantage of competition in the bidding is unlawful and void." The opinion then states the facts of the case, and holds the contract

void, citing *Gullick v. Ward*, 5 Halst. (10 N. J. Law) 87, which is held decisive of the case.

The court say (p. 186): "An agreement not to bid, and an agreement to withdraw a bid already put in, are certainly obnoxious to the same legal objection. It is contended that the particular circumstances of this case relieve the transaction of its illegal character; but we take a different view of these circumstances. The purpose for which the bid was to be withdrawn we do not consider material, nor do we regard as important the fact that the withdrawal resulted in no actual injury to the government. The agreement was entered into for the accomplishment of a project of which the government was ignorant, and whether or not the withdrawal would be detrimental was a matter of conjecture only. The government was not consulted, and, so far as appears, the department intrusted with the management of these affairs neither knew of the agreement nor assented to its withdrawal. . . . The agreement to withdraw was undoubtedly injurious in its tendency, and the policy contravened by it is only to be satisfied by declaring its invalidity."

Gullick v. Ward, 5 Halst. (10 N. J. Law) 87.

This case grew out of public lettings of a mail contract, at which Gullick contemplated being a bidder, but for a consideration agreed to be paid by Ward, another bidder, withheld his bid and so limited competition. Ward refused to pay the sum promised and Gullick sued to recover on the promise.

In deciding the case the Supreme Court of New Jersey, speaking by Ewing, C. J., at p. 90 says: "The policy of the provision contained in the act of congress requiring this procedure by the postmaster-general, in thus publicly inviting proposals, is to enlarge the number of offers, to increase the competition among persons disposed to contract, and thereby not only to secure to the United States faithful and capable carriers, but to procure the performance of this important public service in the best manner and upon fair, just and reasonable terms. . . . Now an arrangement which shall diminish the number of com-

petitors, lessen the number of proposals or induce any one or more to abandon his intention of making an offer to contract, is most evidently in direct contravention of the policy of the act of congress, and tends to defraud, or, perhaps it may be broadly asserted, does at all times actually defraud, the United States." The opinion proceeds to state the reason why in this case the acts of the parties resulted to the actual damage of the United States, and then says: "The circumstances disclosed on the trial, then, most manifestly support the conclusion naturally drawn from the agreement itself; that in object and effect it was inconsistent with the policy of the act of congress, and tended, to say the least, to defraud the United States." The court then cites many authorities showing the principles of law which compel a court to refuse to enforce a promise founded on such consideration, as are very clear, very salutary and perfectly well established. Among the cases so cited are *Jones v. Randall*, Cowp. 39. Lord Mansfield said: "Many contracts which are not against morality are still void as against the maxims of sound policy." In *Blachford v. Preston*, T. R. 95, Lawrence, J., said: "A plaintiff cannot recover in a court of justice, whose cause of action arises out of a contract made between him and the defendant in fraud, or to the prejudice of third persons."

Jones v. Caswell, 3 John. cases 29.

This case arose out of a contract to forbear to bid at a sheriff's sale of real estate, and a promissory note was given for the money agreed to be paid.

Justice Radcliff said: "It was a consideration that ought not to be sanctioned in a court of justice. The law has regulated sales on execution with jealous care, and enjoined such proceedings as are likely to promote a fair competition. *A combination to prevent such competition is contrary to morality and sound policy.*"

Justice Kent said: "I think the consideration must be adjudged void, as against public policy and the interest of the original debtor, whose property was liable to be sacrificed by such combination."

Doolin v. Ward, 6 John. 194; Wilbur v. How, 8 John. 444, are cited and approved.

Thompson v. Davis, 13 John 112, is cited and approved upon the point that an *agreement* which *tends* to prevent competition at a sale under execution is contrary to public policy and void. Spencer, J., said: "It had been urged that the plaintiff was not bound to bid on the second execution and was therefore at liberty to enter into this agreement." (Exactly the contention of counsel for McMullen, i. e., that he was not bound to bid at the letting of the work in question in this suit and was therefore at liberty to make any combination as to his own course as a bidder). "This is not the test of the principle. In none of the cases cited was the party bound to bid; he suffered himself to be bought off in a way which *might* prevent a fair competition. The abstaining from bidding upon consent and by agreement, under the promise of a benefit for thus abstaining, is the very evil the law intends to repress. A public auction is open to every one, but there must be no *combination* among persons *competent to bid*, silencing such bidders, for the *tendency* to sacrifice the debtor's property is inevitable." In the case last cited the contracts sought to be enforced were held void because a *combination* had been entered into under which the number of bidders was reduced. In the case at bar the same result was intended and accomplished by means infinitely more fraudulent and deceptive than in either of the cases cited. In all these cases the bidder either withdrew his bid after it was deposited or declined to appear as a bidder at all. That was dealing more fairly with the parties charged with making the sale or letting the work than was the conduct of McMullen and Hoffman in this case. Nobody pretended to be a bidder who was not. In the case in suit McMullen and Hoffman had formed a combination by which it was agreed that McMullen or the San Francisco Bridge Company should withdraw or should not be a competitor, but that he or it should be a bidder in

form. This fact was not made known to the water committee. McMullen or the San Francisco Bridge Company was, in the language of Justice Spencer *supra*, "a person competent to bid," but there was a "combination" between himself and Hoffman by which McMullen had agreed to withdraw the San Francisco Bridge Company as a competitor, and as appears by his own testimony did, in fact, withdraw as a competing bidder, though he not only kept the fact of his withdrawal secret, but he falsely represented himself by his affirmative action to be a bona fide competitor. If the cases cited are not in the details of their facts exactly like the case in suit, they involve the application of the principle invoked here, and upon facts vastly less to the prejudice of the parties claiming relief than the facts in this case are to McMullen, I am sure, if in the case of the agreement not to bid at a sale, mentioned in either of the cases cited, the party so agreeing had further agreed to *appear* as a bidder and to put in a bid with the knowledge of the other bidder which "did not represent anything" was simply "put in to have it high enough that it would not receive any consideration," (McM., R., p. 229), he would have been still less entitled to relief. Would not his fraud rather afford an additional reason for a more rigorous application of the rule?

Other cases to the same effect and which show that "*the end accomplished is not the test by which we are to judge of the validity of such contracts, but rather the end aimed at by the parties.*" *Is the natural tendency of such an agreement to injuriously influence the public interest?*

Atcheson v. Mullon, 43 N. Y. 147, 149.

Weld v. Lancaster, 56 M. E. 453.

A contract to carry the mail was awarded to Weld. Lancaster was the next lowest bidder. Lancaster delivered to Weld a written promise to pay him a sum of money and to hold him harmless against any claim of the

United States if Weld would decline to accept the contract as awarded and let it go to Lancaster. Lancaster got the contract, but refused to pay as agreed. Weld sued. Lancaster set up the illegality of the contract; one point made by the plaintiff in support of his claim was that the government suffered nothing by Weld's withdrawal because fully indemnified. The court said: "The end accomplished is not the test by which we are to judge of the validity of the contract, but rather the end aimed at by the parties."

Greenhood on Public Policy, p. 178.

"Any agreement which in its object or nature is calculated to diminish competition for the obtainment of a public or *quasi* public contract to the detriment of the public or those awarding the contract is void."

Hellen v. Eckersby, 6 El. & Bl. 64.

"All contracts prejudicial to the interests of the public such as contracts tending to prevent free competition are void."

Holladay v. Patterson, 5 Oregon 177.

"The question of the validity of the contract does not depend upon the circumstance whether it can be shown that the public has, in fact, suffered any detriment, but whether the contract is, in its nature, such as *might have been* injurious to the public."

Richardson v. Crandall, 48 N. Y. 348.

"In all cases where contracts are claimed to be void as against public policy it matters not that any particular contract is free from any taint of *actual* fraud, oppression or corruption. The law looks to the *general tendency* of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate."

Gibbs v. Smith, 115 Mass. 592.

The labor of inmates of house of correction was to be sold at auction. For a consideration to be paid to Gibbs, if Smith should secure and accept the contract he (Gibbs) agreed not to bid. Smith got the contract and performed

it, and Gibbs sued to recover the sum promised to be paid for withholding his bid. Plaintiff also offered to prove that the county was not in any manner injured by the agreement. The court held that the contract was against public policy and void, and directed a verdict for the defendant.

Devens, J., delivering the opinion of the court, said:
 . . . "Agreements, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy and in fraud of the just rights of the party offering it, and therefore illegal. The contract in the present case is manifestly of the latter class. . . . The contract thus made being against public policy no action can be maintained upon it by the parties thereto.

"Nor is it any answer to show that no injury has been done to the party selling. That which renders the contract illegal is not the injury the parties have *actually occasioned*, but the purpose which they must have contemplated when it was made; its validity is tested not by its *results* but by its objects as shown by its terms."

Engleman v. Skrainka, 14 Mo. App. 438.

"It is a uniform rule founded on public policy that any contract the necessary effect of which is to stifle competition in bidding at public or private sales or at lettings of public or private work is void."

Woodruff v. Berry, 40 Ark. 251.

Public printing let at public letting on sealed bids. Several printers agreed to let one bid off the work and share the profits equally. It was held on a trial testing the validity of a contract based upon such a bid that it was against public policy and void, if either the *intention*, the *effect* or the *necessary tendency* of the combination be to *stifle or limit competition* in the bidding.

Jenkins v. Frink, 30 Cal. 586.

There was a contract in writing between several persons for one to buy land about to be offered at sheriff's

sale for the benefit of all. Such contracts held to be void as against public policy and fraudulent, if made to prevent fair competition in bidding or for any other fraudulent purpose.

Hunter v. Pfeiffer, 9 N. E. 124 (Ind.).

A free gravel road was to be built by Warren county, Indiana, and the work was to be let upon sealed bids to the lowest bidder. Hunter, Pfeiffer and two others formed a co-partnership with the avowed and pretended purpose of bidding for the work, and authorized Pfeiffer to bid. Hunter and the other associates to sign such bonds as might be required. Pfeiffer bid the work off for \$13,465. Contract executed by the board to Pfeiffer. Hunter and the others signed the bond required according to agreement. Hunter is excluded from the work and sues Pfeiffer. He alleges that the contract is worth \$3,000; that \$10,000 will complete it and that his interest is worth \$1,000, and having been excluded by Pfeiffer he is entitled to judgment for the amount claimed. He alleges that but for the co-partnership which was formed he would have bid and could have made \$1,000 on the contract. In deciding the case the supreme court of Indiana, speaking by Mitchell, J., say: "In effect, this is to say that the appellant and appellee were about to bid for the construction of the public work which was to be let in pursuance of law, and that the appellant was induced to withhold a lower bid than that which the appellee proposed to make in consideration that he should be taken into partnership and be permitted to share in the profits of a contract which the appellee Pfeiffer was thus to secure. *Upon all such partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of profits anticipated or accrued.* . . . If the courts should lend any countenance to such a contract of partnership as that disclosed in the complaint, in either aspect in which it is presented, *the effect would be to afford facilities for bidders to enter*

into secret agreements and combinations with each other, and thus enable them to defeat the plain purpose of the legislature in requiring such contracts to be let to the lowest bidder. The whole purpose of the statute is to encourage open, fair competition between responsible bidders, and any **secret combination—call it partnership or anything else**—the effect of which is to abate honest rivalry or prevent fair competition, is to be condemned as in violation of public policy and void. No one can predicate an enforceable right upon such an agreement. *Atcheson v. Mallon*, 43 N. Y. 147; *Woodworth v. Bennett*, Id. 273; *Gibbs v. Smith*, 115 Mass. 592; *Hannah v. Fife*, 27 Mich. 172; *Greenhood on Public Policy*, 178.

"The partnership contemplated by this agreement was a **secret arrangement unknown to the officers who had the public interest under their protection.** It was intended that the officers should believe that they were contracting with Pfeiffer alone, while he and those who were accepted as sureties on his bond intended among themselves a **secret partnership** wholly unknown to the board of commissioners. No lawful contract of partnership resulted from such a combination. *Lewis v. Armstrong*, 3 Mylne & K. 54. Persons who engage in forming partnerships of the character disclosed must rely for a division of the resulting profits upon those sentiments of honor which are supposed to prevail among all who form combinations which are condemned by the policy of the law.

"The purpose, tendency and necessary effort of such a contract was to stifle fair, open, actual competition and to perpetrate a fraud upon the public officers." The court then laid down a rule by which a partnership contract for doing such work might be legitimately made, thus: "If, in letting a contract such as this, parties **without knowledge of the bids each other** submit their bids as the law requires and afterwards enter into a partnership for the construction of the work with the knowledge of the officers letting the same, a question of a different character is presented."

This case is almost "on all fours" with the case at bar. It is perfectly evident that the co-partnership entered into between the San Francisco Bridge Company and Hoffman

& Bates in 1891 was entered into for the sole purpose of removing each of the parties as a competitor against the other when the work should be again offered by the water committee. That their *combination* was *secret* and intended to mislead the water committee there is not a shadow of a doubt, especially when the conduct of the parties is viewed in the light of the correspondence between them showing the spirit in which they were operating. In the case cited only Pfeiffer bid, and the public officers having the work in charge supposed him to be the only person interested. In this case these parties did more. The water committee were not only led to suppose they were contracting alone with Hoffman & Bates, and that they were the only persons interested in the bid deposited, but they had before them what was equivalent to a declaration by McMullen that the San Francisco Bridge Company, a known low bidder, was not only not interested with Hoffman, but that he was a competitor for the same work, higher on the manufacturing and laying, but lower on every other item upon which both parties bid. The committee never knew the true character in which these parties appeared as bidders until this suit was commenced. This case alone, without some other authority disputing it, ought to be sufficient to justify this court in affirming the decision of the United States circuit court of appeals. No such opposing authority has been found, for the reason, as I believe, none such exists.

Hannah v. Fife, 27 Mich. 172.

The judge of the circuit court in his opinion upon the exceptions to the answer, referring to *Hannah v. Fife*, says (R., p. 58): "This was a case where the party to whom a contract was awarded for the construction of a swamp land state road entered into a contract with his competitor by which the latter took the contract upon terms somewhat more favorable for the public than the bid upon which the award was made, and agreed to pay the

successful bidder eight sections of land as a bonus for the relinquishment of his bid. The law allowed two sections of land per mile of road as the maximum quantity for the work. Each of the two bids was for this amount. The bid, however, of the unsuccessful bidder, who subsequently took the contract by agreement as stated, was for a roadbed only sixteen feet wide, while the state requirements were for one twenty-one feet wide. The court said that there was no evidence of a previous agreement between the parties except such inferences as may be drawn from the circumstances and the contracts made, and that it was 'difficult to resist the conclusion that these things tend strongly to show the existence of some such previous understanding,' but the court held that whether there was, in fact, any such secret understanding was immaterial; that without such understanding the *tendency* of all *such contracts* between bidders as that in existence in this case 'must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder'; that it 'was this *tendency* rather than the *fact of actual fraud* in the *particular transaction* which is generally recognized as *rendering contracts void as against public policy*,' and that the contract sued upon must be held void upon this ground. The doctrine of the case, in short, is that *secret* agreements between bidders for their mutual profit and to avoid competition with each other *while keeping up the appearance of competition*, and *all agreements having that tendency are void*, and will not be enforced; nor will an agreement between different sets of bidders for a public contract, by which one agrees, in consideration of a sum of money to be paid by the other, to withdraw his bid and assist the latter to obtain the contract be enforced."

Kelly v. Devlin, 58 How. Pr. 487.

In this case it was held that a *secret partnership* made by two persons that they were to be equally interested in the contract for the work obtained by one of the two parties

is illegal, being against public policy, and cannot be enforced.

Noyes v. Day, 14 Vermont, 384.

This was an action to recover the amount of a promissory note given by defendant in consideration that plaintiff would forbear to bid for the support and maintenance of certain town paupers at a public auction. Held that the transaction was contrary to public policy and the note void.

King v. Winants, 71 N. C. 469.

In this case plaintiff and defendant entered into an agreement not to bid against each other so as to enable one or the other to get the contract for the care and maintenance of certain sick persons in the service of the United States and others. The contract held illegal and void. (Brooks v. Martin, distinguished).

Board of Commissioners v. Verbag, 63 Ind. 107.

The defendant obtained a contract to do certain work which was let to the lower bidder, by buying off another bidder. This fact being shown, the supreme court of Indiana held that the contract was obtained by fraud, was against public policy and could not be enforced.

Lloyd v. Malone, 23 Ill. 41.

In this case the supreme court of Illinois held that an agreement among parties not to bid against each other at a public sale of land being designed and calculated to stifle competition, is a fraud upon the law and against public policy, and will afford grounds for avoiding the sale against a purchaser participating in the fraud.

1 Dillon on Municipal Corporations, Sec. 470 (3d Ed.).

"The rule against combinations to prevent bidding at auction sales applies to proposals for government works in response to a call therefor aiming at a contract with the lowest bidder; and combination of contractors whereby

the privilege of bidding is secured by one without competition is against public policy and illegal."

2 Pomeroy Eq. Sec. 934 (2d Ed.).

Where, in pursuance of its general policy of letting contracts for public works or for supplies to the lowest bidder, the governmental officers issue proposals for bids, a *secret combination* and agreement among contractors to refrain from bidding and to prevent competition falls under the same rule, and is illegal. The author in a note (2) cites in support of this proposition *Weld v. Lancaster*, 56 Me. 453; *Atcheson v. Mallon*, 43 N. Y. 147; *People v. Stephens*, 71 N. Y. 527; *Stevens v. Perrin*, 12 Kansas, 297; *Swan v. Chorpensing*, 20 Cal. 182, and other cases cited in note 1 to same section.

Hyer v. Richmond Traction Co., 80 Fed. Rep. 830.

Rival applicants for a street-car franchise in Richmond, Va., agreed to combine in order to prevent competition between themselves or by others in procuring the franchise and to avoid the imposition of conditions by the municipal authorities. The cause came before the United States circuit court of appeals May, 1897.

Simonton, Circuit Judge, delivered the opinion of the court: ". . . Any effort which stifles competition or prevents a fair and reasonable price for property, is against public policy. Especially is this the case when property is a public or quasi public franchise. In the case at bar there were two bidders before the municipal authorities of Richmond for the franchise of a street railway. Naturally and normally that competitor would receive the franchise who made the greatest concession to the public interest. It was withdrawn by the coming together of the parties, who agreed to abandon it for fear they would neutralize each other, and also for fear that the passage of the franchise in favor of one of the two competitors would be loaded with such onerous and exacting conditions that no capitalist could be induced to put money in it. In other words, the competition would induce great and extraordinary concessions for the public good. To prevent this it

was abandoned. Among themselves they would decide what names to be used in procuring the franchise and the policy to be used in prosecuting it; that is to say, there being but one contractor in the field the promoters themselves could, in the absence of competition, decide to whom the contract should be awarded, and could, in some measure, dictate the terms and concessions to be used in procuring the franchise. *The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interest? The rule is that agreements which in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principals of sound public policy, and are void. Citing Atcheson v. Mallon, 43 N. Y. 147.* The conclusion is not unreasonable that the contract was against public policy and void. But it is contended that if this be admitted, the complainant is still protected by the doctrine laid down in *Brooks v. Martin*, 2 Wall. 80, citing a number of cases in which the rule in that case has been followed, and quoting from the opinion of Judge McCrary in *Cook v. Sherman*, 20 Fed. 170:

"When several persons enter into an illegal contract for their own benefit, and the illegal transaction has been consummated, and the proceeds of the enterprise have been actually received, and carried to the credit of one of the parties, so that he can maintain an action therefor without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief." This construction of Judge McCrary is sustained upon examination of the case of *McBlair v. Gibbs*, 17 How. 233, which is the leading case upon which this principle depends. In that case and in all quotations cited in support of it, the cause of action was not the illegal transaction—the void act—but a subsequent independent contract which the law raised. The difference is between enforcing illegal contracts and asserting title to money derived from them. *Tenant v. Elliott*, 1 Bos. P. 3; *Farmer v. Russell*, Id. 296; *Thompson v. Thompson*, 7 Ves. 473, all cited and approved in *McBlair v. Gibbs*, supra. Sir William Grant, in the case in 7 Ves. 473, clearly states the principle. In

that case there had been a sale of the command of an East India ship to the defendant. This was an illegal transaction. In consideration of the sale he had agreed to pay an annuity of £200 to the previous commander, from whom he purchased, so long as he remained in command. Defendant, after remaining in command for some time, retired and secured the retiring allowance of £3,540. The bill was filed to get a decree enforcing the contract, and investing so much of this as would produce £200 per annum. The objection was made that the contract providing for the annuity was illegal, and a court of equity would not enforce it. The distinguished master of the rolls held the contract illegal. He recognized the equity in the fund, if it could be reached by a legal agreement, but there was no claim on the money except through the medium of an illegal agreement, which, according to the determinations, cannot be supported. "How, then," says he, "are you to get at it except through this agreement? There is nothing collateral in respect of which, the agreement being out of the question, a collateral demand arises. In the case at bar the entire cause of action is on the agreement which is void through public policy. The complainant depends altogether upon that agreement, and seeks to set aside everything that has been done, and to enforce the specific performance of that agreement. He asks the court to enforce this illegal contract, and requires the aid of the illegal transaction to establish his case. It follows that the contract under consideration can neither be enforced nor made the basis of any relief in a court of equity. The maxim *in pari delicto* applies. The court will leave the parties to such a contract precisely where it finds them. Courts cannot be made the handmaid of iniquity."

Upon the theory of the defense in the case at bar, the foregoing case is directly in point and clearly states the reasons why the plaintiff here cannot recover. These reasons are, 1st, that the illegal contract which is made the basis of this suit is contrary to public policy, is illegal and void; and, 2d, the relief sought can only be had by the aid of this illegal agreement. If the contract is legal and

valid, then, of course, this case is not in point, nor is *Thompson v. Thompson*, 7 Ves. 473. Indeed, if the contract upon which the suit is based is valid, then this branch of the defense fails. This is the point the court is to determine. The defendant claims that the testimony in the record, when considered in the light of the authorities upon the subject of sales at public auction, and lettings of contract upon sealed proposals to the lowest bidder, shows too clearly for serious question that the contract referred to is against public policy and void. Being so, the court cannot, under the law, give relief, even though it should appear that an equity exists in the fund in favor of McMullen. He can reach it only through a contract made illegal by his own act. *Thompson v. Thompson*, 7 Ves. 473. The reasons why the court will not lend its aid in such cases are well and clearly stated by Mr. Justice Johnson in *Bank of U. S. v. Owings*, 2 Pet. 527. At p. 539 the learned justice says of a contract held to be illegal: "The answer would seem to be plain and obvious that no court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country; how can they, then, become auxiliary to the consummation of the violations of law. . . . There can be no legal right where there can be no legal remedy, and there can be no legal remedy for that which is illegal." After quoting from a number of English cases, *Webb v. Pritchett*, 1 B. & P. 264, is cited, and this language quoted: "The court cannot give assistance to the plaintiff consistently with the principles which have governed the courts of justice at all times. Persons who engage in such transactions must not bring their cases before a court of law."

Scott v. Duffy, 14 Pa. St. 18.

The test whether a demand connected with an illegal transaction is capable of being enforced at law is, whether the plaintiff requires the *aid* of the illegal transaction to establish his case.

Morrison v. Bennett, 52 Pac. Rep. 553.

This was a suit for an accounting for money which had come to one of the parties through a racing transaction which was illegal. The language of the court applies with great force to the facts developed by the record in this case. (P. 557.) "No court will lend its aid to assist the plaintiff in enforcing an accounting in such a case. The very statement of the evidence proves that the object of the parties was most iniquitous, and that the methods agreed upon and doubtless fully executed were all dishonest, immoral, deceitful and corrupt. Men who associate themselves for the purpose of cheating others cannot ask the courts to distribute their booty by adjudging the demands of one against the others arising out of their quarrels over their plunder. As said by Justice Baldwin in 4 Peters, 184: "Public morals, public justice and the well-established principles of all judicial tribunals alike forbid the interposition of courts of justice to lend their aid to purposes like this."

And upon this broad principle *ex turpi causa non oritur actio*, the district court properly refused to carry out the illegal contract. But, insist the appellants, if the agreement of partnership was unlawful and immoral, "the purpose of such partnership must also be admitted to be accomplished and executed, and the proceeds should be divided as agreed upon by the partners." The opinion examines the case of *Sharp v. Taylor*, 2 Phil. Ch. 810, cited by plaintiff, and also the criticism on the opinion of Lord Cottenham in that case by Jessel, M. R., in *Sykes v. Beadin*, 11 Ch. Div. 170; also the case of *Armstrong v. Foler*, 11 Wheaton, 258, in which Marshall, Chief Justice, said that a subsequent collateral or independent contract, founded on a new consideration, not immoral or illegal, is not contaminated by the original illegal agreement." But the court holds the principle of these authority does not apply. The same is said of *Brooks v. Martin*, 2 Wall. 70, and approves the distinction made by the Supreme Court of North Carolina, in *King v. Winants*, 71 N. C. 472, and by the Supreme Court of Massachusetts,

Snell v. Dwight, 120 Mass. 9, in both of which cases each of said courts "decided that they would not examine into, settle up and enforce an illegal contract between the parties to it. Citing further Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. Ry. Co., 61 Fed. 993. The court then proceeds thus: "The New York court of appeals in Woodworth v. Bennett, 43 N. Y. 273, restate the general rule as laid down by Mullet, J., in the earlier case of Gray v. Hook, 4 N. Y. 449, as follows: The general rule on this subject, as laid down by this court in Gray v. Hook, 4 N. Y. 449, as follows: The distinction between a void and a valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the *first class* of cases, *no change in the form of a contract will avoid the illegality of the first consideration, while express promises based upon the last class of consideration may be sustained*" It is unnecessary to go further. By the evidence here offered for plaintiffs, they seek to *enforce directly* an immoral contract, and to secure the fruits of such a contract. It cannot be done. Plaintiffs are entitled to little sympathy. They *knowingly entered into the contract*, and are only suffering the consequences of a dishonest transaction in which they united and which they prove in presenting their case. The fault of the parties being mutual, they can only rely for a share of profits upon that sentiment of honor which one of them wrote would exist when they entered into the immoral combination. Being *in puri delicto*, we apply the maxim, *Potior est conditio possidentis*.

Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. Ry. Co., 61 Fed. Rep. 993.

This was a case where several railroad companies entered into a pooling contract by which it was agreed

that all of the business should be apportioned among the roads, each to do a certain part and receive compensation, or the entire earnings should be paid into one pool and each company be entitled to a certain share. The contract was performed in part, when one of the parties demanded his share of the fund earned and payment was refused. That company sued for its share. The court held the contract void as against public policy, and refused to enforce it. The case was decided by the United States circuit court of appeals of the eighth circuit, May, 1894, Caldwell and Sanborn, circuit judges. "But (say the court), conceding that the contract is illegal and void, the appellant asserts that it has been performed, and that the appellee is bound to account for moneys received under the contract according to its terms. This contention rests on a misconception of the character of this suit. The appellant's claim is grounded on the illegal and void contract, and this suit is, in legal effect, nothing more than a bill to enforce specific performance of that contract."

The case of *Brooks v. Martin* is not in point. In that case the defendant set up an illegal contract, which had been fully performed and executed, as a defense against a demand that existed independently of the contract; whereas in this case the *illegal contract* is set up by the *plaintiff* as the foundation of its action. Strike this contract out, and confessedly the complaint states no cause of action; leave it in, and it states an illegal and void cause of action.

Courts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land, but will leave the parties in the plight their own illegal action has placed them."

The rule applied in this case is controlling in the case at bar. It may be that the statement of the court that the contract set out shows on its face an illegal and void cause of action, does not apply in terms to the contract men-

tioned in complainant's bill. This is so because an agreement honestly made and lawfully carried out, to act jointly in performing the work of executing the contract which had been awarded to Hoffman & Bates, was not illegal. The bill states only so much of the agreement as makes it appear to have been honest and legal; but the evidence shows that the pleader has not stated the real facts. He has omitted all that show the illegality. But this the evidence supplies. Under such circumstances, while the facts as stated in the bill might not render it demurrable, still, on a final hearing upon the evidence the facts disclose a condition just as fatal to the plaintiff's case as though he had stated the whole truth, and by so doing had plead himself out of court, as was done in the case last cited.

The principle announced in *Tool Company v. Norris*, 2 Wall 4, is directly in point upon the proposition, that the law looks to the tendency of acts alleged to be against public policy, rather than to the fact that harm has actually resulted or was intended, to determine the validity of such acts.

To the same effect is the case of *Trist v. Child*, 21 Wall 449.

The Supreme Court of the United States, speaking through Mr. Justice Swayne, says, p. 448: "It is a rule of the common law of universal application that when a contract, express or implied, is tainted with either of the vices last named, as to the consideration of the thing to be done, no alleged right founded upon it can be enforced in a court of justice." Among the cases enumerated by the court to which this rule applies are "An agreement . . . to pay for not bidding at a sheriff's sale of real property; to pay for not bidding for articles to be sold by the government at auction; to pay for not bidding for a contract to carry the mail on a specified route; to pay for securing a contract from the government"; and many other cases.

Smith v. Applegate, 23 N. J. L. 352.

Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 663.

Oscernagun v. Arms Co., 103 U. S. 261, 274.

If it were conceded that the agreement signed by McMullen and Hoffman on the 6th of March, 1893 (Plff. Ex. 1), was new, it would be of no avail to McMullen, for the evidence shows that it is based upon, grew out of and is directly connected with the illegal agreement entered into by the parties long prior to date of its execution, and under which the contract of the city with Hoffman & Bates of March 10, 1893, was obtained.

In Comstock v. Draper, 53 Am. Dec. 18 (1 Mich. 481), the court say (p. 80): "It is a well-settled doctrine of the English-American books that an illegal transaction cannot constitute a good consideration for a promise. If the connection between the original illegal transaction and the new promise can be traced, if the latter is connected with and grows out of the former, no matter how many times and how many different forms it may be removed, it cannot form the basis of a recovery, for repeating a void promise cannot give it validity."

Ray v Mackin, 100 Ill. 246.

One of the streets in Chicago was to be paved. Rival contractors sought the work. An agreement was finally reached between the contractors, and one of them withdrew from the contest. The contractor who withdrew urged those who had acted with him to transfer their support to the other contractor; and at a meeting of a committee of the property-owners to consider and determine upon the matter, the same contractor wrote out a bid for himself and a lower bid for the other contractor, according to agreement beforehand. In an action to recover upon the agreement made by the contractor who secured

the contract, to pay the other contractor a certain sum out of the profits of the job, it was held that the agreement sued upon, taken in connection with its consideration, was against public policy and a fraud upon the persons who were to pay for the improvement of the street, and therefore formed no valid foundation for the action. The testimony showed that the contractor, long after the work was done, promised to pay the amount.

Morris Run Coal Co v. Barclay Coal Co., 68 P. St. 173.

At p. 188 the court say: "A second question is, whether the bill drawn in this case by the general sales agent of the Barclay Coal Co, in favor of the Morris Coal Co. to equalize prices upon the settlement under the contract is such an independent cause of action as will support the suit. When a bill, note or bond is but an instrument to execute an illegal contract, it is tainted by the illegality, and cannot be recovered. The illegal consideration enters directly into the instrument, and is followed up because the law will not permit itself to be violated by *mere indirection* . . . The present case is free from difficulty, the money represented by the bill arising directly upon the contract to be paid by one party to another party to the contract in execution of its terms. The bill itself is therefore tainted by the illegality, and no recovery can be had upon it."

Gray v. Hook, 4 N. Y. 449.

At p. 459 the court say: "The distinction between a void and valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract; or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases no change in the form of the contract will avoid the illegality of the first consideration, while express promises based upon the last class of consideration may be sustained. Mr. Chitty

says the test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires any aid from the illegal transaction to establish his case."

Meguire v. Corinne, 101 U. S. 108.

This case was based upon an agreement entered into to secure the appointment of a certain person as special counsel for the United States.

Mr. Justice Swayne says (p. 111): "The law touching contracts like the one here in question has been often considered by this court, and is well settled by our adjudications"—16 How. 314; 2 Wall. 45; 21 Wall. 441; 1 Wall. 542.

"In *Trist v. Child* (supra), while recognizing the validity of an honest claim for services honestly rendered, the court said: But they are blended and confused with those which are forbidden; the whole is a unit, and indivisible. That which is bad destroys that which is good, and they perish together. . . . Where the taint exists it affects fatally in all its parts the entire body of the contract. In all such cases, *potior conditio deflentis*. Where there is turpitude, the law will help neither party."

The alleged new "agreement" upon which plaintiff rests his right to recover is not only based upon and grows directly out of the illegal contract, but ~~it~~ directly appeals to the court to aid in the execution of both.

Plaintiff would have no case without the aid of the contract with the city. It is that which he relies upon to show what he claims is his due. The alleged new agreement was entered into for the purpose of executing that contract, and for no other purpose. Plaintiff makes a direct appeal to the court to take the execution of that contract out of the hands of Hoffman, place it in the hands of a receiver, and direct him to complete it and collect the money for the services performed. This is the identical work to perform which the parties entered into the alleged new agreement. Under the authorities last cited, such

new agreement would be as illegal as the original, and no action would lie to enforce either.

The law leaves parties to illegal contracts as it found them.

Bartle v. Coleman, 4 Pet. 187.

This case is a contract made by the complainant with a public agent, a deputy quartermaster-general, and an amount exceeding \$50,000, in the profits of which he was to participate, etc. Mr. Justice Baldwin (p. 188) says: "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a — and deeply practiced fraud, which, when detected, deprives — *particeps criminis*, it is a just infliction for a premeditated — him of anticipated profits or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers by shifting the loss from one to another, or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of law."

Dent v. Ferguson, 132 U. S. 50-66.

Meguire v. Carnine, 101 U. S. 108.

Woodstock Iron Co. v. Extension Co., 129 U. S. 643, 663.

Miller v. Davison, 3 Gillman, Ill. 518; 44 Am. Dec. 715.

Caton, J. (p. 717, Am. Dec.): "No principle is better settled than that where two or more persons embark in an unlawful transaction, and one get the advantage of the other and appropriates more than his proportion of the spoils to himself, the court will not interfere to make him divide with the others. As they commenced with the violation of the law, they cannot invoke its aid in any way. The law will not meddle with gains obtained by its own outrage as between those who have been engaged in trampling it under foot. This, however, is not out of regard to the one who claims immunity from having violated the law, but it is because he who complains is equally

guilty." In the case of *Holman v. Johnson*, Cowp. 343, Lord Mansfield says: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, seems at all times very ill in the mouth of the defendant. It is not, however, for his sake that the objection is ever allowed, but it is founded in general principles of policy, and whenever from the plaintiff's own stating, or otherwise, the cause of action appears to arise from the transgression of a positive law of the country, he has no right to be assisted." "This is a defense which the guilty is allowed to set up against his associate in guilt, as a sort of punishment for the participation of the latter in the violation of the law. It is the guilty, and not the innocent, which it is the policy of the law to punish."

From the evidence in the record the following conclusions must necessarily be reached:

First—That in 1891 McMullen, representing the San Francisco Bridge Company, and Hoffman, doing business in the name of Hoffman & Bates, were competent and qualified bidders for the work in contemplation, to provide the city with water, and at that time they entered into an agreement to act together in obtaining and performing any contract they might secure with city, each agreeing to get all the information he could about the work, its cost, etc., and each to furnish one-half the money required to perform any contract they might secure, and to share equally any profits or bear any losses which might result.

Second—That they also *secretly* agreed that while they were to be interested alike in any contract which might be obtained, and (the contracts were to be let upon sealed proposals to the lowest bidder) they would not present to the water committee, who had charge of the letting for the city, bids signed by them jointly, thus showing themselves to the committee as joint bidders and jointly interested in any contract which might be obtained, but would bid separately, one in the name of the San Francisco

Bridge Company and the other in the name of Hoffman & Bates.

Third—That they *secretly* agreed that each should submit to the water committee bids for the several classes of work to be done and materials to be furnished, and they further *secretly* agreed that the bids so submitted should be so arranged as not to compete with each other.

Fourth—That in pursuance of this agreement McMullen presented to the water committee, in the name of the San Francisco Bridge Company, proposals, and Hoffman presented to the committee proposals as follows:

HEADWORKS.

San Francisco Bridge Company.....	\$16,550 00
Hoffman & Bates.....	17,800 00

BRIDGES.

San Francisco Bridge Company.....	\$31,279 07
Hoffman & Bates.....	33,562 94

STEEL CONDUIT FROM HEADWORKS TO MT. TABOR.

San Francisco Bridge Company.....	\$348,781 00
Hoffman & Bates.....	359,278 00

Conduit from headworks to Mt. Tabor of steel or wrought iron, making and laying of pipe.

San Francisco Bridge Company.....	\$514,664 00
Hoffman & Bates.....	\$465,722 00

SUBMERGED PIPE.

San Francisco Bridge Company.....	\$97,340 00
Hoffman & Bates.....	No bid.

Each of said bids was accompanied by a certified check for 5 per cent. of the amount of the bid.

Fifth—That all these bids were seen by both parties before they were deposited with the committee, and were *secretly* arranged by the mutual agreement of both. That the bids for manufacturing and laying pipe were changed by the mutual agreement of Hoffman and McMullen and increased many thousands of dollars above what the engineers of the parties showed the work could be done for at a fair profit.

Sixth—That the bids for manufacturing and laying and for furnishing the plates were arranged by the same parties with a view to having the bid of the San Francisco Bridge Company for the plates withdrawn and that of Hoffman & Bates, which was over \$10,000 higher, substituted in case the proposals of other bidders should fall in such a manner as to make such arrangement practicable.

Seventh—That on every item upon which both parties bid, the lowest bid was the one which had been jointly agreed upon, and in which both were interested, and all others were not deposited in good faith, but as mere matters of form, and intended to mislead the committee.

Eighth—That at a former letting in 1887 McMullen, in the name of the San Francisco Bridge Company, was the lowest bidder, and the San Francisco Bridge Company was the lowest bidder on every item upon which both parties bid at the letting in 1893, except the items of manufacturing and laying the pipe. This bid of the San Francisco Bridge Company was \$48,942 higher than the bid of Hoffman & Bates, which McMullen and Hoffman had *secretly* agreed the contract could be safely taken and performed for.

Ninth—That the contract was awarded to Hoffman & Bates on Hoffman's bid of \$465,722.

Tenth—That under the *secret agreement* between McMullen and Hoffman, the contract for manufacturing and laying the pipe was to be, and was, awarded in the name

of Hoffman & Bates, and a contract to perform the work was to be entered into in the same name with the city of Portland through the water committee, but it was *secretly* understood and *secretly* agreed that the contract should be in fact the property of McMullen and Hoffman, and was to be performed by them, the expenses to be paid, the losses borne and the profits divided equally between them, all of which had been agreed upon long before the bids had been submitted, and in pursuance of which all actions of the parties had been taken to procure the contract, and in its performance up to September 16, 1893.

Eleventh—That on the 6th day of March, 1893, McMullen and Hoffman reduced to writing the portion of the original agreement of 1891 which had not been performed in procuring the contract with the city, and for the purpose of evidencing the interest that each of the parties had in the contract which had been awarded in the name of Hoffman & Bates, and signed their names to the same.

Twelfth—That based upon the bid of Hoffman & Bates and the award of the contract thereon, on the 10th day of March, 1893, the city entered into a contract with Hoffman & Bates, in which Hoffman & Bates agreed to perform the work of manufacturing and laying the pipe as specified in their bid.

Thirteenth—That the water committee was without any knowledge or notice whatever of any agreement or understanding between McMullen and Hoffman that they were jointly concerned in procuring contracts from the city, or that they were partners in the bids which had been submitted or were partners in the contract let in the name of Hoffman & Bates, and had no notice that McMullen and Hoffman were ever jointly interested until this suit was commenced; but, on the contrary, the water committee supposed and believed that the bids submitted by McMullen in the name of the San Francisco Bridge Company, as

well as those submitted by Hoffman in the name of Hoffman & Bates, were all *bona fide* bids, and that both parties were *bona fide* bidders, each honestly endeavoring to secure a contract upon the bid submitted by him. That the committee understood and believed the said bidders to be what they appeared on the face of their bids to be—competing bidders.

The facts thus clearly proven show that McMullen and Hoffman entered into the secret combination for the purpose of preventing competition, at least between themselves; but in order to prevent the fact being known to the committee, they not only kept it a profound secret, but represented to the committee by the most conclusive evidence—their separate bids—that they were in fact competitors. This representation was a falsehood, a fraud, the natural tendency and effect, and in this case the purpose, of which was to mislead and deceive. *An agreement to pursue such a course is void, as is also any contract with the city procured by such means, and the courts will not aid in enforcing them.*

The learned judge, who presided at the trial at the circuit, stated the rule clearly and forcibly as applicable to such facts when he said (R., p. 71): "Upon all the cases cited or to be found, and in any view of the case consistent with public policy and the principles of equity, there can be no relief in such a case." Judge Hawley, delivering the opinion of the Circuit Court of Appeals, uses this language (R., p. 605): "In the present case it is evident that McMullen and Hoffman understood each other; that their intention was to prevent open competition, which the law encourages. In their confederacy they were aiming at the same result—that of compelling the city to pay a higher price for the work than McMullen believed it was worth." The same judge says (R., pp. 606-7): "The dividing line is always sharply drawn with reference to the particular facts of each case, and the conclusion reached that where the

parties have acted openly and honestly and entered into an agreement which neither in its purpose, effect or natural tendency is to prevent fair competition, it can be and should be enforced. But when there is a secret combination—call it partnership or any other name—the effect of which is, or the natural tendency of which is, to abate honest rivalry or prevent fair competition, it is to be, and is, condemned as violative of public policy, and held to be absolutely void. All the authorities hold that where either the intention, the effect or the necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy, and, when it is discovered, will be stamped with marks of disapproval in any court of law or equity.” Who will say that this is not a correct statement of the rule of law applicable to the cases supposed, and who will say, if the facts were correctly found by the Circuit Court of Appeals, that the rule of law just stated is not correctly applied? Certainly no one, and therefore the writ which brought this record to this court could not have been based upon any error of the Circuit Court of Appeals in its findings of fact upon this branch of the case, or in applying the law to them. The decree of the Circuit Court of Appeals must, then, be affirmed unless error was committed in respect of some other phase of the case.

The case of the defendant is made out, and unless the plaintiff presents reasons for taking it out of the operation of the rule which so plainly applies, and which leaves the parties where it finds them, the decree of the Court of Appeals must be affirmed.

Counsel for plaintiff claim that such reasons exist and what they are claimed to be is stated in full in their brief. It is not deemed necessary to examine them in detail; a few only will be noticed.

One contention of the plaintiff is, that the acts of McMullen and Hoffman in procuring the contract are in all respects correct, proper, upright, honest and honorable;

that the agreements originally entered into between the parties to secure control and perform work for the city, and the contract of the city in the name of Hoffman & Bates are wholly free from any taint of fraud or illegality. If this contention is true, there is an end of this branch of the case. But the facts in the record, and the authorities cited in this brief, plainly negative this contention.

Another ground upon which it is claimed the effect of the unlawful conduct of McMullen and Hoffman in securing the contract from the city may be avoided is, that if it be admitted that the partnership agreement entered into between the parties in 1891 to secure contracts for this work and to execute them and share the profits were illegal, and that the contract of Hoffman & Bates with the city was void for the same reason, all this was cured by the execution of the writing which was signed on the 6th of March, 1893, after the contract had been awarded to Hoffman & Bates, and thus all the acts of the parties prior to that date were "no more than the advancement of a legal contract of co-partnership." I suppose this statement is based upon the assumption that the agreement of March 6 is a new and independent agreement of co-partnership wholly disconnected with the illegal agreement and acts by which the contract with the city was secured. This contention is not supported by the facts, nor has it the support of any legal principle. It is not necessary to repeat here the evidence, to which the attention of the court has already been directed in this brief (60 to 70 *supra*), to show that the writing of March 6, 1893, is in no sense whatever a new agreement. It is a mere repetition of what was agreed upon between the San Francisco Bridge Company, through its manager, Mr. Catt, and Mr. Hoffman, for Hoffman & Bates, in 1891. (R., pp. 151, 152, 153, 154.) It simply reduces to writing what was left unexecuted of that agreement, what was left to be done after the con-

tract had been secured. The agreement to secure a contract and perform it was one and indivisible. The act of reducing a portion of it to writing did not change its character as a unit. The thing agreed to be done was the identical thing the original agreement was formed to do, and upon identically the same terms. The original agreement was that they would perform a contract if they got it and would divide the profits if there were any. They would have done the same thing, and would, under their *secret* agreement, have had the same right to and interest in the contract with the city without the written agreement as with it, and the plaintiff in his complaint alleges that the writing is executed to "evidence" the interest of the parties in it, not to convey any interest not already owned by either. The writing itself does not pretend to do more. Counsel has enumerated the provisions of the alleged new agreement in his brief (p. 63). First—That Hoffman and McMullen shall share equally in the contracts awarded on the bid of Hoffman & Bates. Second—That each will furnish and pay half the expenses. Third—Each will receive half the profits or bear and pay half the losses. Fourth—That they will share equally in any other contract which may be secured for any other work from the city connected with this water system. (See dep. of Catt, R. 152 to 154.)

The further testimony of Mr. Catt, found on pages 153, 154, 155, shows that a large amount of work was done by himself and his assistants in carrying out the agreement entered into with Hoffman in 1891, to secure the work of constructing the Portland water works. So well was it understood that the parties were in actual partnership in this work that his correspondence concerning the same was addressed to "Lee Hoffman and J. McMullen, of Portland, Oregon." This testimony is offered by the plaintiff, and shows the facts as they actually existed. It removes all doubts and shows that the writing signed by McMullen

and Hoffman on the 6th of March (plff. ex. No. 1) was in no sense a new agreement. That no new partnership was founded upon or created by it, but it was, as has been so often stated, a mere reducing to writing of an agreement, partnership, or what you will, which had been as effectually performed in part as was the work done after the writing was signed, in completing the contract with the city. This state of the facts entirely disposes of any claim of the plaintiff that avoids the effect of the fraud and illegality of the acts by which the contract with the city was obtained by having entered into a new contract purged of the illegality of the original.

In support of their contention, counsel for the plaintiff make what seems to me a most remarkable claim. (Plff. brief, pp. 62, 63): "But, granting for the argument respondents' contention in regard to the character of their acts in submitting bids, it was no more than the performance of an illegal act in the advancement of a legal contract of co-partnership?" This contention amounts to this: If McMullen and Hoffman formed a partnership for a purpose not forbidden by law or public policy it is wholly immaterial what methods they adopt to accomplish the purposes of the partnership. To illustrate, McMullen and Hoffman entered into a co-partnership to be joint bidders at the lettings for the work of building the Bull Run pipe line. Such a partnership, if honestly entered into and legally carried out, is not unlawful. But for the purpose of securing a contract with the city, instead of bidding, as they might legally have done, in their joint names, openly and honestly presenting themselves to the city in their true character, they kept their partnership agreement *secret* from the city, deposited bids in their several names, and assumed to the city the character of competing bidders, exhibited their respective bids to each other, and purposely so arranged them

that they should not be competing; all of which acts are illegal, but as a result of them a contract was secured with the city. It will not be disputed, I take it, that a contract so obtained by the same persons, if not co-partners, would be absolutely void. But counsel for the plaintiff seem to have discovered some magic in the fact of this partnership relation which makes it valid. Such a result is impossible. The statement of the proposition condemns it. It cannot be successfully denied that practices such as this record discloses on the part of McMullen and Hoffman are, in the language of Mr. Justice Swain, in *Maguire v. Corwine*, 21 Wall. 108, 111, "an unmixed evil." The law as laid down in that case is that such acts, "whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source."

In *Trist v. Child*, 21 Wall. 441, while recognizing the validity of an honest claim for service honestly rendered, this court said: "But they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. . . . Where the taint exists it affects fatally in all its parts the entire body of the contract. In all such cases *potior conditio defendentis*. Where there is turpitude the law will help neither party. These remarks apply here. The contract is clearly illegal, and this action is brought to enforce it." If any authority were needed this is conclusive against the contention of the plaintiff. For the purposes of the illustration it is assumed that the contract between McMullen and Hoffman was honestly entered into, but the record shows no facts upon which such an assumption can rest. The entire correspondence between McMullen and Hoffman shows that they never once dreamed of dealing honestly with the city, but on the contrary this correspondence shows nothing so plainly and directly as a deliberate purpose to defraud the

city by "selling out" to other bidders (McM. to H., Jan. 26, R. 519), frightening others from bidding (McM. to H., Feb. 8, R. 522), forming pools to keep down competition (H. to McM., Jan. 22, R. 563), and "pulling" the water committee (McM. to H., March 8, R. 526; McM. to H., Dec. 31, R. 518), or corrupting this clerk by "taking him into our camp" (McM. to H., Aug. 4, R. p. 557) and inducing him to "return bids unopened." Yet all this is not cured, but concealed by the ingenious covering of a co-partnership, under which plaintiffs' counsel claims the right to recover. Much is said in plaintiffs' brief upon the distinction between a partnership and a contract for a partnership; the making of an agreement and the *launching* of the partnership. The only notice which need be taken of this contention is this: Plaintiff, in his bill, sets out the alleged agreement of March 6, 1893, as the foundation of the alleged partnership upon which he, in part, bases his right to recover. The writing itself more effectually acknowledges that the partnership under which he claims had already been formed and launched than that it creates a new one. It recites that the contract with the city had been secured in the name of Hoffman & Bates by the *aid and assistance of McMullen*, and what this aid and assistance was, and how it came to be rendered, is fully and plainly stated by Mr. Catt in his deposition and in the testimony of Mr. McMullen himself, which has been heretofore set out in this brief. The writing suggests *no partnership* beyond describing the joint interest which the partners have in the contract, which has been secured by their joint efforts, and is a repetition of the agreement of 1891. The agreement for joint action between these parties was made in 1891, and if a partnership it was *launched* the moment the parties to it began its execution by taking steps to secure the work, and continued until the 16th day of September, 1893, when dissolved by Hoffman, and was in no

material respect affected by the writing which was signed on the 6th of March, 1893. So all these nice distinctions and hair-splitting speculations which counsel for the plaintiff have, with so much learning and industry, presented to the court, seem to me to be wholly irrelevant and immaterial. If the contracts which this suit is brought to enforce are illegal by reason of the unlawful methods adopted by McMullen and Hoffman, all the laws relating to partnership ever dreamed of cannot render them valid.

One phase of this partnership relation which counsel for plaintiff presents with much apparent candor as sufficient to remove the effect of the fraudulent acts of the parties, and which renders the contracts he sues on void, is the agency which, it is said, the law casts upon every member of a partnership in his relation to other members, so far as the partnership business and property are concerned. This agency of partners is insisted upon for the purpose of invoking the aid of a rule of law to the effect that if money is paid to one of two parties to an illegal contract in which both are equally interested, but which, on account of its illegality, cannot be enforced in a court of law, if the party to whom the money is paid makes ^{bid} ^{for} express promise to pay the other his share, this promise ^{may} be the foundation of an action upon which a recovery may be had. The reason is that the express promise, and not the illegal contract, is the foundation upon which the action to recover rests.

Counsel for the plaintiff therefore asserts, first, that Hoffman, being a partner of McMullen, was his agent, and that money paid to Hoffman for the partnership was received, one-half for himself and the other half for McMullen. His next claim is that the partnership relation raises an implied obligation on the part of Hoffman to pay to McMullen his half of any profits which might result from their contract with the city. He then argues thus:

Hoffman and McMullen are partners in the performance of the contract with the city. Profits resulting from the work which have been paid to Hoffman. One-half of the money so received by Hoffman was received by him as the agent of McMullen because he was a partner, and the law raises an implied promise on the part of Hoffman to pay to McMullen his share. Now, for the sake of the argument, counsel for the plaintiff admits that the contract of partnership, as well as the contract with the city, were illegal as against public policy and could not be enforced at law. But he says the money having been paid to Hoffman and the law making it his duty to pay it over, there is an implied promise by Hoffman to pay it to McMullen, and that takes the case out of the operation of the rule which would prevent McMullen from recovering the money upon the contract itself. This contention cannot possibly be maintained. It is based upon the claim that the receipt of the money by Hoffman and the implied obligation to pay over created a new contract, independent of the partnership agreement, which, for the sake of the argument, is conceded to be inviolate. The rule is stated in *Gray v. Hook*, 4 N. Y. 449 in this: "The distinction between a void and valid new contract of relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract; or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced at law, and upon the performance of which the law will raise no implied promise. In the first class of cases no change of the form of the contract will avoid the illegality of the first consideration; while *express promises* based upon the last class of considerations may be sustained." The case admitted by the plaintiff for the purpose of the argument comes within the last class, "the execution of an agreement which could not be enforced by law, and for the performance of which the law will raise no implied promise."

Under this authority, as well as upon the reason of the proposition, there was no implied promise which the law raised between McMullen and Hoffman, because the contract between them is illegal; but the authorities say that notwithstanding the law will raise no implied promise upon such an agreement, still if the party who has received the money in which the other party had an equitable interest, which might be enforced at law but for the illegality of the contract, an express promise by the party who received the money, to pay it to the other might be sustained upon the *consideration* of the equity which the party to whom the money was to be paid, had in the fund. There is no allegation in the bill, and not a syllable of proof in the record, that Hoffman ever promised to pay McMullen a farthing. So that the entire contention of plaintiff's counsel that the law raised an implied promise on the part of Hoffman to pay money to McMullen is wholly without foundation. It seems to me that counsel's reasoning would come to this: An illegal contract of partnership has been entered into between Hoffman and McMullen; on account of its illegality neither party can have the aid of the court to enforce it, yet, although it is void for all the purposes which are expressed in it, and cannot be enforced, it is nevertheless valid for the purpose of creating a legal liability by one party to the other, or, in other words, to create a new contract between the parties which the law will enforce. I take it that if this agreement or pretended agreement between Hoffman and McMullen is void for illegality for one purpose so that it cannot have the aid of the court to enforce it in one respect, it is equally void in all other respects. In other words, if this contract, by reason of being obtained by illegal means, cannot have the aid of the court to compel Hoffman to account to McMullen, it cannot be brought into court and made the basis upon which the court will rest an implied promise on the

part of Hoffman to pay money to McMullen. It must be remembered that the record does not show that when the money was paid to Hoffman by the city, the city had any knowledge whatever that McMullen had any interest in it. There is no testimony tending to show that McMullen or Hoffman ever notified the city of their partnership, but the whole of the evidence upon that subject shows that the city, through its water committee, entered into the contract with Hoffman & Bates, knew them, and only them, as the persons who were entitled to receive compensation for the work done, and the only evidence that McMullen had any interest whatever in such money was the private agreement between himself and Hoffman. It cannot, therefore, be said that the city paid the money to Hoffman for McMullen's use, but paid it to Hoffman for his own use, and McMullen's claim upon it rests solely upon the secret agreement which counsel, for the sake of argument, admits to be invalid. Another matter in this connection, I think, may be properly stated. The bill of complaint in this case sets out the substance of the contract of Hoffman & Bates with the city and the alleged agreement between Hoffman and McMullen. These two contracts are made by the plaintiff's complaint the basis of this suit; are shown not to have been performed, and he prays the court to complete them and settle up the business between the parties. There is no allegation of any right to recover upon the basis of any new contract. No allegation of any right to recover upon any promise made by Hoffman to pay McMullen. The position now taken by the plaintiff upon this phase is to abandon the case he makes in his pleadings, and undertake to enforce his claim upon the basis of a new promise not stated in his complaint and wholly inconsistent with the cause of suit set forth in the pleadings.

The plain truth is that if this contract is illegal and

cannot be enforced for that reason, there is no evidence in the record upon which to base a claim that a new promise was made by Hoffman upon which a recovery can be had. On the other hand, if the testimony in the case fails to show that the contract is illegal, then the court will enforce it according to its terms, and all this exceeding refinement to which counsel has resorted in his brief to find a pretext upon which he hopes to avoid the illegality is labor lost.

In his brief, page 78, plaintiff's counsel quotes from the opinion of the Circuit Court of Appeals this language: "If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. (*Hanks v. Baber*, 53 Ill. 292; *Chase v. Trafford*, 116 Mass. 532; 1 Am. and Eng. Ency. of Law, 2d Ed., 437.) But it does not appear that any such admission has been made. No promise had been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought." Referring to these remarks, counsel for plaintiff uses this language: "This concession carried with it an unqualified admission of McMullen's right to recover in this suit, for the simple reason that an implied promise is as effectual in law as an express one, and the very receipt of the money by Hoffman raised an implied obligation on his part to pay over to McMullen his half of it. Where money is received by one to the use of another it does not require an express admission or promise from the depositary to enable the beneficiary to recover."

This language of counsel shows a most complete misconception of the statement made by the Circuit Court of Appeals, and of the law applicable to the condition of things to which the language of the court refers. The court referred to a contract which was illegal and could not be enforced at law. One which raises no implied prom-

is for any purpose whatever, because it is void. The court assumes that McMullen had an equitable interest in the money paid to Hoffman, but in consequence of the illegality of the contract out of which that equity arose, McMullen could not recover against Hoffman his interest. But, say the court, if Hoffman had promised expressly to pay McMullen, the equitable interest of McMullen in the fund would have been a sufficient *consideration* to support the promise. Counsel for the plaintiff, wholly ignoring this feature of the proposition, proceeds upon the assumption that the court was treating the contract between Hoffman and McMullen as valid; one which might create an equitable obligation on the part of Hoffman to McMullen, and yet void when McMullen attempted to enforce it at law. The difference between counsel and the court is, the court was speaking of a contract which was void, but that an equity might grow out of it which would support an express promise which a court of law might enforce, while counsel states the principle applicable to a valid contract which may be enforced without the aid of any new promise.

Counsel cites a number of cases which he claims support the theory he advances, but which I do not regard as necessary to notice, for the simple reason that if the contracts which he is seeking to enforce in this suit are valid, then there is nothing for the court to do but to enforce them. If they are not valid, then they cannot have the aid of the court, and all the efforts of counsel to secure that aid must be unavailing. It is manifestly impossible upon the face of this record for counsel to show that the contracts sought to be enforced in this suit are not the identical, original transactions which, as we claim, the record shows are illegal. The writing signed by the parties on March 6 in no way changed the character of the original agreement. The principle applicable to the condition is laid down in *Gray v. Hook*, *supra*, thus: "Nor did the addition of an

honest dollar cure the illegality of the remainder of the consideration. When the contract grows immediately out of and is connected with an illegal or immoral act a court of justice will not lend its aid to enforce it; and if the contract be in part only connected with the illegal transaction, and grows immediately out of it, though it be in fact a new contract, it is equally tainted with the illegality of the contract from which it sprung." In *Toler v. Armstrong*, 4 Wash. C. C. 299, Washington, J., uses this language: "I understand the rule, as now clearly settled, to be, that where the contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. And if the contract be in part only connected with the illegal transaction and growing immediately out of it, though it be in fact a new contract, it is equally tainted by it."

Another ground upon which the plaintiff seeks to avoid the effect of the illegal contract upon which his suit is based is that "McMullen does not need the support of the matters urged by the respondent in defense of his suit, and the courts have no occasion to investigate these matters in arriving at a solution of the pending controversy." This contention would probably be true if the respondent had filed no answer to the bill. There is nothing on the face of either contract which would suggest its illegality, and if McMullen could have been left to simply state so much of the transaction out of which his claim arises as was favorable to himself, he might not have done what he probably did, state a cause of suit. But, in stating his cause, he sets out a contract with the city, which, though valid upon its face, is illegal and void when the facts and transactions out of which it grew are made known to the court. He sets up an agreement which he calls an agreement of partnership, which though valid upon its face is void for the same reason as above stated. The contract with the city is the basis upon which rests, and out of which grows, the fund which he asks the court to divide between himself and

Hoffman. All the transactions between the parties by which the money received by Hoffman was earned must necessarily be inquired into by the court, and it is altogether immaterial, so far as the duty of the court is concerned, whether these circumstances and transactions come before it by the pleadings or are established by the evidence. The court must inquire into the facts and must base its decree of distribution, if it makes any, upon the contract with the city. The plaintiff would have no basis for relief if he did not show that profit had resulted from the execution of the contract between the city and Hoffman & Bates in which he claims an interest; nor could he show any interest in himself if he had not alleged the facts which he claims are set out in his contract of partnership as the basis of his interest, and which he presents to the court for its guidance in determining the amount to which he is entitled. It is difficult to see how counsel can seriously pretend that he does not necessarily require the *aid* of these two contracts in order to make out his case. Strike out the allegations of his complaint relating to the contract with the city and that relating to his alleged partnership, and he will have no cause of suit. And if the validity of these agreements had not been assailed by the respondent the court would still have been obliged to call them to its aid for the purpose of determining the interests of the parties in settling the alleged partnership. Counsel now contends that having made a case by his pleadings which would entitle him to recover without disclosing the illegality of the contract upon which he bases his right to recover, that that is the end of the matter and that the respondent has no right to assail the validity of these contracts, either by his pleadings or by his proof. He expected to the answer at the trial at circuit and attempted to eliminate from it all the allegations showing the illegality of the contracts pleaded. The circuit judge overruled

these exceptions. Counsel for the plaintiff objected to all evidence offered by the defendant to support the allegations of the answer in this regard. It would seem to be an easy way to try a lawsuit if counsel's contention is correct, if it is true that when he stated a case upon the face of his record, the opposing party should neither have the right to plead or prove any facts which would defeat his right of recovery. Of course, no such rule obtains in any court. The defense in this case presented by the respondent, that the contracts described in the complaint are void as against public policy is not a defense which is countenanced by the courts out of any consideration for the defendant or for either party to the controversy. It is a defense which is addressed to the court in the interest of the public, of the law and its proper administration. It is indeed a defense which, in a case like this ~~may~~, it may be said in the language of Lord Mansfield, in the case of *Holman v. Johnson*, Cowp. 343: "The objection that a contract is immoral or illegal as between the plaintiff and defendant seems at all times very ill in the mouth of the defendant. It is not, however, for his sake that the objection is ever allowed, but is founded on general principles of policy, and whenever, from the plaintiff's own stating, *or otherwise*, the cause of action appears to arise from the transgression of a positive law of the country, he has no right to be assisted." In *Miller v. Davidson*, 44 Am. Dec. 715 (3 Gilman, 518, Ill.), Caton, J., delivering the opinion of the Supreme Court of Illinois, says: "No principle is better settled than that where two or more persons embark in an unlawful transaction and one gets the advantage of the others and appropriates more than his proportion of the spoils to himself the court will not interfere to make him divide with the others. As they commenced with a violation of the law they cannot invoke its aid in any way. The law will not meddle with gains obtained by its own outrage between those who have been engaged in trampling it under foot. This, however, is not out of regard to the one who claims immunity from having violated the law, but it

is because he who complains is equally guilty." Then, after citing the language of Lord Mansfield above quoted, the court proceeds: "This is a defense which the guilty is allowed to *set up* against his associate in guilt as a sort of punishment for the participation of the latter in the violation of the law. It is the guilty and not the innocent which it is the policy of the law to punish."

In *Coppell v. Hall*, 7 Wallace, 542, the court, having under consideration the validity of a contract alleged to be illegal, Mr. Justice Swayne, delivering the opinion of this court, says: "The instruction given to the jury that if the contract was illegal the illegality had been waived by the reconventional demand of the defendant, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but for the law itself. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reason. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." *Collins v. Blantern*, 1 Smith's L. C. 630, and notes. In *Crichfield et al. v. Bermudez Asphalt Paving Co.*, Supreme Court of Illinois, October 24, 1898, 21 N. E. 522, the court had occasion to consider the validity of an illegal contract. The question of its invalidity, however, was not raised by the pleadings. In delivering the opinion of the court, Magruder, J., says: "It is urged that the question of the invalidity of this contract is not raised in the court below, nor by objections to the introduction of evidence. Where a contract is in terms *contra bonos mores* it is not necessary for the defendant to plead the objection. A court will not proceed to judgment upon it,

even if both parties assented thereto. In such cases there can be no waiver. The defense is allowed not for the sake of the parties but for the sake of the law itself." The court then quotes the passage from the opinion of this court in *Coppell v. Hall*, 7 Wall., above quoted; and then says, at page 558: "If the objection is not made by the party charged, it is the duty of the court to make it on its own behalf. Courts owe it to public justice and to their own integrity to refuse to become parties to contracts essentially violating morality or public policy, by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court *whenever and however* the character of the contract is made to appear." *Morrill v. Nightingale*, 93 Cal. 452.

In *Gravier v. Carrabys Ex'r.*, 17 La. 132, where the objection that an agreement was contrary to public policy had not been raised in the court below and it was urged that the upper court could not consider it, the supreme court of Louisiana says: "Where an exception is put in at the argument in the Supreme Court suggesting that the contracts between the parties to the suit are illegal, immoral and contrary to public policy, the court is bound to notice it, even without any plea; and in such case no recovery can be had."

This identical question came before the Supreme Court of New Jersey in the case of *Hope v. Linden Park Blood Horse Association*, decided June 16, 1896, and reported in 34 *Atlantic*, 1070. The question arose upon a contract which was claimed by the defendant to be void as against public policy. The court say, at page 1071: "The question now mooted is, whether the court will permit a party to such an agreement to show its corrupt and illegal character in defense of an action against him to recover money paid to him in pursuance of its terms. The trial judge thought that if one party to such an agreement should make out a *prima facie* case for recovering back money paid under it, without exhibiting the illegality, it would not be competent for the person sued, who had been party to the agreement, to show the illegality, and defeat such

recovery. The rule is that in an action in which either party to such a contract seeks redress from the other for his own benefit, he will be left by the court in the position in which he has placed himself." At page 1072, the court say: "It appears to me to follow from this view of the foundation of the rule with respect to illegal and corrupt contracts, that the policy which constrains the court to deny all relief to the parties, demand that where either of these parties shall offer to show that the cause springs from an illegal or corrupt agreement, the court shall admit and consider the legal proof offered to that end. It certainly does not further the salutary effect of the rule that neither party will be aided by the court, or satisfied, as to its impartiality, to exclude proof of some of the facts essential to show the entire transaction, and thus exhibit its illegality, merely because they are offered by a *particeps criminis* against whom a *prima facie* case is made by one equally corrupt, who has gained an advantage by presenting to the court garbled and partial proofs which suppress part of the truth, and impose a mutilated state of facts upon the court in place of the real transaction."

² Kent's Commentaries, 467. Chancellor Kent says: "The courts of justice will allow the objection that the consideration of a contract was immoral or illegal to be made even by the guilty party to the contract; for the allowance is not for the sake of the party who raises the objection, but is grounded on general principles of policy." In 2 Starkie, 86, it is said: "Where the illegal consideration is set out upon the record, the objection may be taken either by demurrer or in arrest of judgment. But where it does not appear on the record the defendant may show that the claim is in reality founded upon an illegal and noxious agreement."

In *Smith v. Applegate*, 23 N. J. L. 352, which was a suit upon a promissory note, under a plea of the general issue, the defendants were permitted to show the illegality of the transaction, of which the giving of the note was a part. So in *Nellis v. Clark*, 20 Wendell, 24, in a suit upon a note, it was held that the defendant might produce proof of a like character. And a similar right in the defendant was

recognized in *Harrison v. Hatcher*, 44 Ga. 638; *Inhabitants of Worcester v. Eaton*, 11 Mass. 368, and *Smith v. Hubbs*, 10 Me. 71, 78.

In the greater number of cases cited the illegality of the contract was raised by the defendant. Even the case of *Brooks v. Martin*, 2 Wallace, 70, upon which plaintiff is disposed to almost entirely rest his case, the illegality of the transaction which it was claimed in that case would prevent a recovery, was set up by the defendant.

Counsel for the plaintiff has mistaken the principle which is laid down by the cases to the effect that a contract which may be remotely connected with an illegal contract may be enforced if it is itself legal, provided the aid of the illegal contract is not required. But this is not a question of the right to plead the illegality or to prove it if properly pleaded, but whether or not when pleaded and proved it shows that the party may or may not recover.

The authorities above cited show this to be the rule which would obtain in a case like the present, even if the illegality of these contracts had not been plead by the defendant. The plaintiff requires the aid of the contract with the city, as well as of his alleged partnership agreement, to enable the court to enter a decree in his favor upon the case which he makes in the complaint. It would have been entirely proper for the defendant, if, instead of setting out the fraud which vitiates this contract, he had simply denied the liability. He might have introduced all of this evidence under such a denial, and when the evidence which this record discloses came before the court, it would have shown so clearly and plainly that the contracts had been obtained by methods which rendered them void as against public policy, that the court would have been compelled, on its own motion, to have refused the relief prayed for and sent the parties out of court.

Counsel for the plaintiff referring to a statement made

by Judge Hawley in deciding this case for the Circuit Court of Appeals, has quoted in his brief, page 86, a paragraph to which he directs the attention of this court, which I will not reproduce, and says that the rule therein stated, correct enough in itself, is entirely misapplied to the case before the court, and proceeds, on page 87, to show in what the misapplication consists. The only answer that I think necessary to show counsel's misapplication of the rule, and his failure to apprehend its true character is, that he treats the matter of the defense set up by Hoffman as pertaining to himself personally, and the court recognizing it, does so with a view to aiding Hoffman. The universal rule laid down by all the courts and repeatedly stated in this brief, is that it is not for the sake of either of the parties to the transaction that the court allows this defense to be made, but for the sake of the law itself, and it is wholly immaterial whether the illegality of the contract sought to be enforced is presented by one party or the other. The question and only question before the court is, is the contract one which the court ought to recognize or aid in any manner, entirely irrespective of how the parties to it may be affected. Counsel has cited a considerable number of cases growing out of the Sunday laws in the New England states. This is evidence of counsel's industry, but it seems to me that it shows a plentiful lack of comprehension of the real question before the court.

As I read plaintiff's brief, and as I understand his argument made therein and the grounds he has taken all through this controversy, his chief reliance for reversing the judgment of the Circuit Court of Appeals are substantially these: Conceding the contract with the city to have been obtained by such means as that it would be void as against public policy, and conceding further that the agreement between Hoffman and McMullen to secure the contract from the city by the means finally adopted was also

void as against public policy, still, since Hoffman and McMullen, after the estimates were completed, the bids prepared and deposited and the contract awarded upon the bid of Hoffman & Bates, McMullen and Hoffman entered into a new agreement of partnership for constructing the work described in the contract with the city. That the money received by Hoffman was the result of the execution of the contract with the city, and that the contract signed by Hoffman and McMullen after the contract with the city had been awarded to Hoffman & Bates, was in no way concerned in, connected with, and did not grow out of the other unlawful contract, is free from all taint on account of them and must be enforced. Counsel rests this claim chiefly upon the authority of *Brooks v. Martin*, 2 Wall. 70. It is impossible for me to see how this case can be regarded as controlling the case at bar, or as authority in it, any further than it shows that an illegal contract cannot have the aid of the law to enforce it. The facts upon which the two cases rest are so absolutely unlike that it seems to me that it is scarcely possible to find a resemblance. In *Brooks v. Martin* a partnership was entered into between Brooks, Martin and Ford to engage in "the purchase and sale of bounty land warrants which may have been or may be issued under the laws of congress," etc. For the purpose of carrying out this agreement Brooks went to New Orleans, but, contrary to the terms of their partnership contract, bought soldiers' *claims* before any scrip or warrants had been issued upon them. Sales of these claims before warrants issued had been declared, by the act granting the lands to the soldiers, void. No title could pass to the purchaser as against the soldier. The act making the grant was limited in its effect exclusively to the soldiers; was for their protection and benefit and for no other purpose whatever. The public was concerned in the matter of these sales simply to the extent that to buy them was

to violate a law of the land. The contract of partnership between Brooks and Martin did not authorize the purchasing of these claims. They were purchased by Brooks not in pursuance of the partnership agreement, outside of it. While the law made sales of these claims void as against the soldiers from whom they were purchased, the title of the purchaser was valid against everybody else. Justice Miller says, in delivering the opinion: "Undoubtedly the main object of the ninth section of the act of February 11, 1847, was to protect the soldier against improvident contracts of the precise character of those developed in this record. It was a wise and humane policy and no court could hesitate to enforce it, in a case which calls for its application." The business the partnership was formed to carry on was entirely legitimate and proper. The act of purchasing the claims, which was not within the purpose of the partnership as expressed in it, was unlawful. The proceeds of this unlawful transaction came into the hands of the partnership, and there the entire illegal transaction closed. From that time forward every step taken was illegal in itself, and was a part of the business which the partnership was organized to carry on. It concerned nobody to know how the partnership got these soldiers' claims if the soldiers themselves did not complain. Having acquired them, they proceeded to handle them as though legitimately acquired, and what should be the result could in no way be affected by the manner in which they were acquired. After the claims were secured it would seem that this partnership procured the scrip, then the warrants, then located the lands, then made sales of the lands, sometimes for cash and sometimes part for cash and the balance on time secured by mortgages; the money received from the sales of the lands was loaned upon notes and mortgages. Now, when Martin asked for a settlement of this partnership, and a division of the profits,

Brooks undertook to avoid a settlement and to avoid giving to Martin his share of the profits, by showing that a number of years prior to the time the suit was commenced he, perhaps with the consent of Martin, had, in violation of their partnership agreement, done an unlawful act in purchasing soldiers' claims, from which money had been received, and from the investment of which in pursuance of their partnership the profits sought to be divided by Martin had been derived. This court held that such a defense could not avail in such a case. It is perfectly apparent that in making the division claimed by Martin of the profits growing out of the transactions of the parties which were entirely legitimate, the aid of the illegal contract of purchasing the claims was in no way required. That transaction had been closed more than ten years before. In the division of the profits of the other transaction, even a reference to it was not necessary. It could affect the result in no possible way, and the court, it would seem to me, was bound to grant the relief prayed for. The case is not within the rule of any of the authorities where relief is denied. Between that case and the case at bar there is no common point. No great question of public policy was involved in the case of Brooks v. Martin. The only persons that could be affected were the few soldiers to whom congress had made the donations of land, and at the same time enacted a law for the protection of their interests. The public was concerned just to the extent that it could not look passively upon a violation of its laws, no matter how narrow they might be in their operation. To violate such a law was a defiance of public authority. To that extent the question of public policy was involved in Brooks v. Martin and no further.

In the case of McMullen v. Hoffman the question of public policy is involved in its broadest sense and its most extended and comprehensive application. It is so far-

reaching in its consequences that it includes almost every department of business, whether of the private individual or the sovereign. It has demanded and received the special attention and care of courts, and has been so jealously protected by them that the decisions concerning it constitute a class by themselves which furnish a guide to the court in administering the law where questions pertaining to the sale of property at public auction or contracts let upon sealed bids are involved. It applies to the peasant, who, desiring to change his place of abode, sells his little belongings at a public vendue, with equal force as to the great transactions of the government inviting bids for carrying its mails, constructing its forts, improving its rivers and harbors, building its battleships, and to all transactions in every department of society where goods are to be sold at public auction or contracts to be let to the lowest bidders. In this case the single city of Portland had occasion to expend nearly \$2,000,000 for an important public purpose which must be supplied by some system of taxation of her citizens. It was important that the work should be done as cheaply as possible, and to that end bids were invited, competition among bidders was solicited, in order that the work might be done upon the most reasonable terms for the taxpayers. In this respect this case differs widely from *Brooks v. Martin*.

In the next place the illegal contract relied upon by Brooks had been long since completed in every possible sense; while in the case at bar the contracts, which, in order to make the case of *Brooks v. Martin* authority here for any purpose, must be admitted to be illegal, are made directly the foundation of the plaintiff's suit. The contract of Hoffman & Bates with the city is admitted to be void, but that very contract plaintiff is compelled to rely upon to make out his case. He could have no relief without its aid, and he has therefore presented it to the

court in his pleadings, and not only asks the court to decree to him the profits which he says have accrued to him from it, but he asks the court to take the contract itself into its own hands, and by ~~its~~ aid receive ~~and~~ earn the profits which may result from its completion. He asks also that the alleged partnership agreement shall be executed by the court's order, and when all is completed he prays the court to divide the profits. What in Brooks v. Martin resembles this condition? In the next place the act of purchasing the soldiers' claims had no possible connection with, or relation to the transactions of the copartnership in their later dealings. In all these later dealings the contracts with the soldiers were matters of no possible interest. The later transactions were as absolutely separate and distinct from the matter of buying the claims, as two transactions could possibly be. In the case at bar the contract with the city and the partnership agreement were absolutely inseparable. The agreement of partnership depended for its very existence upon the contract with the city. Remove that and the partnership agreement ceased to exist. This contract with the city, which it is admitted was acquired through the unlawful acts of McMullen and Hoffman, is brought before this court by McMullen, and its aid is asked to enforce it, and at the same time he brings here what he calls a partnership agreement formed by the *particeps criminis* whose illegal acts procured the contract with the city, and asks the court to aid him in reaping the rewards of his own rascality. Is there anything in this that in the faintest manner resembles Brooks v. Martin, or which could make any rule of law which might control that case applicable to this? Certainly not. Add to these points of difference the other fact, which is so fully established, that the alleged partnership agreement which counsel contends was entered into after the contract with the city was awarded to Hoffman

& Bates, was, in fact, an agreement entered into long before that time, and was itself a part of the very unlawful combination by the aid of which the contract with the city was to be obtained, and the case of Brooks v. Martin is still less an authority in plaintiff's favor. The acts of the partnership between Brooks and Martin in dealing with the purchased claims carried them at every step away from the illegal contract of purchase. These acts were to secure *scrip* for the *claim*; to secure *warrants* for the *scrip*; to *enter lands* with the *warrants*; to sell the lands for money and mortgages; to loan money on mortgages. While from the beginning to end, in all the transactions between McMullen and Hoffman, the illegal contracts have been the center, the very life, the inspiring cause of every act, the thing and the only thing out of which they had any hope or expectation of reward for their misconduct, and McMullen now brings them with unclean hands into court and asks its aid.

No plainer, clearer or more correct statement of the distinction between this case and the case of Brooks v. Martin can be made than is made by Judge Hawley in the opinion rendered by him for the Circuit Court of Appeals. No better illustration can be brought forward than that presented in King v. Winants, 71 N. C. 469, of the distinction between the case of Brooks v. Martin and the case now at bar. The distinction is also made very plainly in the case of Morrison v. Bennett, 52 Pac. 533 (Mont. 1898), and a number of other cases cited in this brief. The illustration employed by the court in the case of King v. Winants is: "Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler the other rifles his pockets of a thousand dollars, and then refuses to divide; the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a court of justice hear them? No case can be found where a court

has allowed itself to be so abused. Now, if these robbers had taken the thousand dollars and invested it in some legitimate business as partners and had afterwards sought the aid of the court to settle up that legitimate business, the courts would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks v. Martin*, *supra*, so much relied upon by the plaintiff."

Counsel for the plaintiff, referring to this illustration, for the purpose of distinguishing the case before that court from *Brooks v. Martin*, says, brief, pages 138-9: "If any parallel can be drawn between a case involving a flagrant breach of the peace and an infraction of a criminal statute, and a case in which a general offense against public policy is presented, we submit that this illustration makes for *McMullen*." Counsel then proceeds with his argument upon the theory that the agreement between *McMullen* and *Hoffman* to complete the contract, which had been acquired by means which rendered it void, was as much a new and independent contract of partnership as was the agreement between the highwaymen to invest their money in a legitimate business after they had completed the robbery. That is the fault of the reasoning. In the case supposed, there is no suggestion that the parties had entered into an agreement of partnership to commit the robbery for the purpose of raising funds to carry on the business in which they afterwards invested it. The illustration assumes that the commission of the robbery was an entire independent act. Finding themselves in possession of the money they then formed a partnership to invest it in a legitimate business. A division of the profits of that business would in no way require the aid of the transaction by which the money originally invested was acquired. In the case at bar all the testimony on the subject from every witness who has spoken shows that the agreement between

McMullen and Hoffman was not simply to secure a contract from the city, but to secure and execute such contract. The principal consideration was the execution, because out of that alone they were expecting to receive remuneration. When they seek, as they do here, for a division of the profits, it is not for the profits of an enterprise entered into as an independent transaction after the contract had been secured, but it is to divide the profits of an enterprise which they had jointly undertaken, a part of which was to secure the contract and another part to perform it, the two constituting one transaction, the aid of which being absolutely indispensable to enable the court to grant the relief prayed for.

Another error into which counsel has manifestly fallen is the assumption that the result would be the same, whether, in the case supposed, the highwaymen formed a partnership, the object of which was to commit the robbery for the purpose of raising funds to carry on a business in which they proposed to embark, and in which in pursuance of their partnership agreement they did in fact embark, and out of which profits were realized, that the rule in *Brooks v. Martin* would allow them to recover profits under such circumstances, the same as if the robbery were one thing and the partnership under which the funds obtained by the robbery was an entire different and independent thing. In the case first supposed, the partnership agreement to rob and to invest the money would constitute one agreement, and under all the authorities the illegal part of such a contract would render void the whole of it. In the latter the last contract would have no relation whatever to the act of procuring the money and might be legal.

If counsel for respondent should undertake to answer in detail the many suggestions presented in the brief of counsel for the plaintiff, this brief would be extended beyond all reasonable limits, and counsel will therefore rest the

case upon the affirmative arguments and the authorities cited, rather than in its denials and answers to what they regard as unsound and mistaken reasonings and arguments, presented by counsel for the plaintiff, calling attention to only a few of the points made in plaintiff's argument.

All the leading cases cited in the plaintiff's brief were presented at the circuit at the time the exceptions to the answer were being considered, and were also presented in counsel's brief in the Circuit Court of Appeals. These authorities were considered and reviewed by both these courts, and this review and examination is set out in the record in the opinions delivered by them respectively. That of the circuit court, beginning on page 58 of the record, and that of the Circuit Court of Appeals on page 595, all these cases are fairly considered and the contention of counsel for plaintiff was more fully answered by them than counsel for respondent could expect to do, and will be content to refer the court to these opinions for answer to his contentions.

Counsel for plaintiff, in his brief, page 124, makes this statement: "If there was any turpitude in the action of Hoffman and McMullen in the submission of their bid, so far as Hoffman was concerned, this was beyond the reach of the court when this suit was brought, for the matters now assailed had been completed and Hoffman had placed beyond recall McMullen's interest in their joint venture. Counsel then proceeds to quote from the opinion of the learned judge of the Circuit Court of Appeals as follows, (Record, page 613): "The learned counsel for appellee, recognizing the force of the reasoning of the authorities, admits, for the purpose of his argument, that if, after award was made to Hoffman, he had refused to enter into the partnership arrangement, McMullen could not have compelled him to do so, nor collect any damages for his refusal, because the grounds then existing as the basis of appellee's claim would have been that he had rendered service in

securing the award, and, necessarily counting upon that service, he would have to bring it into court and its character would have been a subject for investigation. But when Hoffman entered into the partnership agreement all that matter, as between them, became a dead letter.' If this position could be maintained it would furnish a very convenient way for escaping the penalty which the law imposes upon all persons who have secured contracts in an illegal and unlawful manner. A contract secured by corrupt means—the bribing of public officers, buying off rival bidders, thus stifling all competition where contracts are to be let to the lowest bidder—could always be enforced by a simple agreement of partnership by parties guilty of the fraud. The fraud, under this rule, is a thing of the past—has become 'a dead letter' or is made honest by a single stroke of the pen, creating a new agreement to share and share alike in performing an illegal contract."

Counsel reasserts this proposition in his present brief and says that "when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead letter," and he says he will demonstrate it. This he undertakes to do by claiming that the agreement between McMullen and Hoffman of March 6th was a new agreement wholly independent of and disconnected with the fraudulent contract which he is himself seeking to enforce. And the way he says that that contract effects this result is that the execution of the contract by Hoffman operated as an assignment to McMullen of half interest in the profits that might be derived from the execution of an illegal contract, in the acquirement of which both Hoffman and McMullen were *particeps criminis*. A contract which, for the purposes of this case, he admits was procured from the city by means which rendered it illegal and void. As has been before stated in this brief, he bases his claim upon an agreement which the court could not, as he concedes, under the law, enforce, because it is void and illegal, and yet he claims that the same contract will be held to be

valid for the purpose of raising an implied promise on the part of Hoffman to pay McMullen his share of the profits claimed. It is an assertion by him of a doctrine which he cites no authority to support, but which is directly controverted by authorities cited in this brief, notably *Gray v. Hook*, 4 N. Y., 449. The authorities he does cite in support of his proposition simply declare what is the effect of a legal contract of partnership. Declares the obligation which exists between them and the interests which they have in the partnership effects. But the agreement upon which he relies is one which is void for many reasons. In the first place, the record shows that the pretended agreement of partnership bearing date of the 6th day of March, 1893, was not made at that time, that whatever rights McMullen had in the contract out of the execution of which the profits sought to be divided arose, was entered into long before the contract with the city was awarded, and that no new assignment was ever made, or attempted to be made, to McMullen of any interest that he had not acquired by his participation in the proceedings, which were themselves illegal, and by means of which the contract with the city was rendered unlawful and void.

In the next place, it cannot be possible that a rule of law exists which would prevent the courts from granting aid to enforce a contract because it is illegal, if such aid were asked by the individual whose conduct rendered it illegal, while, if the same parties formed themselves into a partnership, and in that capacity brought the same contract before the courts, its aid would not be denied.

No such case has ever been cited by counsel, and it would be surprising if any such should ever be found.

The reference to the transaction by the learned judge of the Court of Appeals as completely answers the contention, as ever so extended an argument could do. The

fact is, that the proposition is so unreasonable in its character, that it furnishes its own answer by its statement.

Counsel for plaintiff, at page 180 of his brief, makes this statement: "The action of McMullen in permitting a high bid for the work in suit had no rational tendency to deceive the water committee."

In support of this proposition counsel has cited a great number of authorities for the purpose of showing, as it seems, that the question of public policy is one which is resorted to only when all other defenses fail, and that, after all, it does not raise a question of any considerable importance. The great number of cases cited, which show with what jealous care the courts have undertaken to guard the people of this country against the frauds which might be practiced in cases where property is sold at public vendue, or contracts let to the lowest bidder, whether in the interest of private citizens, private corporations, public or quasi-public corporations, states or the nation, furnishes the most complete answer that I can make to the suggestion of counsel tending to bring this important element of our governmental policy into contempt, or at least to make it appear of small importance. And so far as the tendency of McMullen's conduct is concerned, a little reference to the testimony will show that the counsel for the plaintiff is altogether in error in his proposition. By this record it is shown that in 1887, when this work was offered by the water committee, Mr. McMullen, in the name of the San Francisco Bridge Company, was the lowest bidder, would have been entitled to the contract, but that the bonds were not issued out of which money was to be derived for paying for this work. This fact, presented McMullen before the committee as a careful bidder; one whose opinions of the value of the work would be entitled to consideration. His correspondence with Hoffman shows that he prided himself on what he termed being

a "hard bidder" and proposed to Hoffman that they make these people, who it was understood would be bidders at this letting, understand that they were going after the contract and were going to "bid hard" for it, and says in one of his letters, in substance, that if they find that we, the San Francisco Bridge Company, are going after this work on the same lines that we did before they will be afraid of us and will buy us off. In the next place, in the bid that was submitted by Mr. McMullen for the San Francisco Bridge Company in the present case, this same low bidder presented to the committee a bid in which he declared, in effect, that the work in question (manufacturing and laying the pipe) could not be profitably done for a sum less than \$514,000. The bid of Hoffman & Bates, prepared and secretly agreed upon by McMullen & Hoffman, for the same work was \$465,000, which is \$49,000 less than the amount which Mr. McMullen said, by his bid for the San Francisco Bridge Company, the work could profitably be done for. Besides this, at the same bidding, Mr. McMullen, bidding for the San Francisco Bridge Company upon the submerged pipe, put in a lower bid than any other competitor, and would have been awarded the contract if the committee had chosen to let the work at that time. In the matter of the head works, the bridges and furnishing the plates, upon which Hoffman & Bates also bid, his was the lower bid. What other tendency, may I inquire, could these proceedings have had, than to lead the committee to believe that the bid of Hoffman & Bates must be an exceedingly favorable one to the city? What other "rational" tendency could this conduct of McMullen have than to deceive the water committee, to the manifest prejudice of the city. It does not seem that any further remarks are necessary on this feature of the plaintiff's case.

Another proposition presented by plaintiff's counsel and found on page 190 of brief is: "The water committee of the city of Portland was in no degree influenced by McMullen's bid, and did not take any different action in connection with it than it would have taken if it had never been submitted." This is answered by the single proposition that it is wholly immaterial whether the committee was or was not influenced by such action. A great number of cases have already been cited which state the doctrine too plainly to be successfully contradicted, that it is not the success of an unlawful scheme which renders the contract under such circumstances void. The rule is stated in *Gibbs v. Smith*, 115 Mass., 592, in these words by Devons, J.: "Nor is it any answer to show that no injury has been done to the party selling. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose which they must have contemplated when it was made; its validity is tested, not by its results, but by its objects, as shown by its terms." A score of cases might be cited repeating the principle here asserted, and so far as my reading and research have gone, not one case can be found to the contrary.

Under this head counsel in his brief, at page 201, refers to the circumstance disclosed by the testimony that, at the instance of McMullen, the bid which had been agreed upon between himself and Hoffman to be deposited in the name of Hoffman & Bates, of \$479,000 in round numbers, was reduced at McMullen's instance \$13,500, and that since the bid next below the bid of Hoffman & Bates so prepared was only \$1,615 less than theirs, and assuming that but for this reduction this bid would have been accepted by the city, it is claimed that McMullen's act saved the city \$11,885, for which counsel claims great consideration in favor of Mr. McMullen as a friend of the city.

In the light of the evidence this claim might, it seems to me, properly be regarded as ludicrous. The evidence,

it will be remembered, shows that the reason McMullen insisted that the bid should be reduced was that he had, to use a slang phrase, "got on" to Wakefield's bid, and if he did not get below that he would lose the contract. So he deliberately flung away \$13,500 which he was trying to get and was only prevented from getting, because he was afraid that somebody would underbid him. The fact that he flung it away for such a reason effectually impeaches the integrity of his bid, and shows that he was willing to get from the city, not compensation for what the work he was proposing to do was reasonably worth, with a fair profit, but all that he could possibly compel the city to pay. A claim like this from McMullen stands upon the same footing as would be a claim by a highwayman for credit because in committing his robbery he overlooked a secret pocket which contained a sum of money, and so left it unstolen. McMullen is no more entitled to credit for having caused a reduction of the proposed bid than the highwayman would have been because he overlooked the money of his victim.

All further discussion of this point in plaintiff's argument will be dismissed with the declaration that it was wholly immaterial whether the city actually suffered or not, if the course pursued by Hoffman and McMullen in procuring the contract with the city naturally tended to that end.

It is not, however, by any means conceded that in point of fact no injury resulted to the city from the secret combination of McMullen and Hoffman, but on the contrary it is strenuously insisted that the record shows that, but for this secret combination, unknown to the committee and directly intended to prevent competition between them, did result in the city's accepting the bid of Hoffman & Bates of \$465,000 for manufacturing and laying the pipe, whereas, but for that combination, McMullen,

for the San Francisco Bridge Company, would have taken the contract, based upon the estimates which he and his engineers had prepared, and which he repeatedly declared would have been a safe bid, for a sum not to exceed \$420,000. The city is, therefore, actual loser as a result of this secret combination not less than \$45,000.

Another point stated in plaintiff's brief on page 201 is: "The partnership business of Hoffman and McMullen embraced work outside of the contract of the city of Portland with Hoffman, and also numerous transactions wholly independent of that contract, the profits of which were included in the decree of the Circuit Court in the case at bar."

The answer to this claim is apparent at a glance at the record and the circumstances disclosed by it. A contract had been entered into between Hoffman & Bates and the city to perform certain work for the city. In the course of its performance in some matters of detail, work was required not strictly within the terms of the contract with the city; that is to say, not specifically mentioned in the specifications, but which were in fact included within the power of the city under the contract, to require the same to be done, paying therefor what it should be reasonably worth. The work performed and included in the decree of the Circuit Court was directly connected with and constituted a part of the work necessary to be done to the proper completion of the contract, although not expressed in it, and this the city had the right to require. The only difference being that the work so required of the contractor, and not enumerated in the specifications, entitled the contractor to extra compensation.

It is not probable that contracts of this magnitude are ever executed without more or less "extra work" being done, for which extra compensation is made, and although not technically within the written specifications, is always regarded as a part of the contract essential to the proper

completion of the work. Besides, under the circumstances of the case, the work here done for which compensation was made by the city, was done in pursuance of an illegal contract entered into by these parties long before the contract was awarded by the city to Hoffman & Bates, the claim of McMullen to the contrary notwithstanding, and this work is so directly connected with, and growing out of, and belonging to the unlawful transaction that it cannot be segregated from it.

It should be said in this connection that the quotation contained in the brief of counsel for the plaintiff, on page 201, purporting to be from the writing signed by McMullen and Hoffman, is not correctly made, undoubtedly the result of inadvertence. The quotation is: "It is further hereby agreed that if either of the parties hereto shall get a contract for doing, *or do* any other work let or to be let by said committee, for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be equally shared and borne by said parties." The contract itself is as follows: "And it is further hereby agreed that if either of the parties shall get a contract for doing, *or to do*, any other part of the work," etc.

It will be noticed that the language as quoted by counsel that "if either of the parties hereto shall get a contract for doing *or do* any other work let," etc. The distinction between the two expressions is very material and very important so far as the claim now made by counsel for the plaintiff is concerned. His statement is that if the parties shall get a contract for doing *or do* any other work. That means if they shall get a contract to do any other work they shall divide the profits, or if they shall *do* any other work *without* a contract they shall divide the profits. Now the contract does not so provide. The contract provides that if they shall get a *contract for doing* or shall get a *contract to do* any other work they shall divide the profits. There is no stipulation in their partner-

ship agreement to the effect that any work shall be done except such as shall be done upon contract, and no profits divided, except such as shall result from the execution of such contract. Therefore, counsel's argument shows for itself that McMullen, under the terms of his agreement with Hoffman, would be without a claim to any profits for work done, except in pursuance of contracts duly entered into. He is not, therefore, in any view of the case, basing his right upon his agreement with Hoffman, entitled to any share of the profits of work done by Hoffman in the construction of the water works, which was not included in the specifications attached to the contract with the city, because there is no allegation or proof that the extra work was done in pursuance of any contract.

Two other items are referred to which need no more than a passing notice. One is that Mr. Hoffman established and carried on along with the work as it progressed a boarding-house, at which the employes upon the work were boarded and a profit realized. That he also established and maintained along the same line a store from which supplies could be furnished to the employes, and from this store profits were also realized. The claim that these matters constitute a separate business, a distinct enterprise carried on by the parties engaged in constructing the water works, is so manifestly unsound that it scarcely seems necessary to answer it. This store and eating-house were as much a part of the system of constructing the work, of completing the contract, as was the hiring of men. The object of locating an eating-house in the neighborhood of the work was to facilitate the work. Men could not labor without food, and it was absolutely as necessary that means should be taken to provide them with food as to furnish them with tools, and this was done, not as an independent enterprise, but as one of the agencies employed for the purpose of speedily bringing the

work to a conclusion. The fact that Mr. Hoffman showed himself to be so skillful a manager of the business as to turn this necessity into a source of profit, only shows how skillfully he managed the business, and how he reduced the expenses of his contract to the minimum. What is said in regard to the eating-house applies equally to the store. Laborers had to be clothed. If they were compelled to quit their employment to make journeys to the city whenever they were in need of shoes or of clothing or of tobacco, the contractors would not only have been deprived of their labor during their absence, but they would have taken the greater risk of their employes failing to return. For the purpose of avoiding these contingencies, the store was established, the laborers provided on the spot with what they needed, and again through Mr. Hoffman's skillful management this necessity was changed from a source of probable loss, and not only facilitated the prosecution of the work, but made it a source of profit. All these things were directly connected with, and a part of, the execution of the contract with the city. If my memory is not at fault, this feature of the case was first presented in counsel's application for a rehearing at the Court of Appeals, and was not suggested at the trial, either at the Circuit or in the Court of Appeals. If I correctly understand counsel's position here, it is that if this court should find that the Circuit Court of Appeals committed no error in any other regard, it did commit an error in not finding that this extra work done by Hoffman in constructing the water works and in keeping the boarding-house and the store, were entirely unaffected by the illegality which rendered void the contract in other respects, and that a decree must be entered here requiring the respondent to pay over to the plaintiff the profits arising from these three sources. It is impossible for me to suppose that this court can reach any such conclusion. If there were no other reason, the

fact that the record discloses that these transactions are directly connected with, immediately grow out of, and are dependent upon the illegal contract which plaintiff is here now to enforce, would make it impossible for the court to grant such relief.

Out of all that has been said by the plaintiff or submitted in this very much too extended brief, this case comes to a single point, and that is, that the contracts upon which the plaintiff's cause rests are shown by the record and by the law applicable to such cases to be void as against public policy, and cannot therefore have the aid of the court to enforce them. That the plaintiff comes into court basing his right to recover upon contracts which are tainted with iniquity, are foul with fraud, were procured by the aid of acts of deceit and wickedness, and that the court cannot lend its aid to or assist those who have thus willfully trampled the law under foot. That no fact has been presented in this case as the basis of a legal principle, which takes the case out of the operation of the rule that denies to persons who are *particeps criminis* in the law's violation the aid of the court to assist them in the division of the plunder which they have acquired by their unlawful conduct. This was the conclusion reached by the Circuit Court of Appeals. That conclusion has been most ably, forcibly and directly stated in the opinion of that court. I am unable to find a single proposition in that opinion which is not supported by an overwhelming array of authorities, almost all of which have never been controverted in any court. I am unable to discover where any error was committed, either in the findings of fact or in the application of the law to them, and while it is true that as the result of a casual examination, as I take it it necessarily was, made upon the application of plaintiff for the writ of certiorari, this court determined to issue its writ, I cannot avoid the conclusion that upon a careful, painstaking-

ing, thorough examination of the facts and the law this court will reach the conclusion that the Circuit Court of Appeals was correct, and their decree will be affirmed.

If such is the conclusion reached it is, of course, an end of the case, but if not it will then become necessary to consider the respondent's second defense. This defense is that on account of the failure of McMullen to perform his part of the partnership agreement, Lee Hoffman, on the 16th of September, 1893, dissolved that partnership, and thereafter McMullen had no part whatever in its execution and no interest in its result; was entitled to no profits which might thereafter have been earned, and was liable for no losses.

The partnership agreement, whether it be regarded as the agreement entered into between Hoffman and Catt, the manager of the San Francisco Bridge Company in 1891, or the writing which was signed by the parties on the 6th day of March, 1893, specifically provided that each of the parties should furnish one-half of the money necessary to carry on the enterprise and that they should share equally the profits or pay the losses which might result from the venture. The complainant's bill does not allege that he performed his part of the agreement by paying his proportion of the money, or that he ever paid any money into a fund for the purpose of carrying on the work, but he does allege that the San Francisco Bridge Company furnished a plant for such work and purchased certain utensils required in laying the pipe, the total amount of which, as the record shows, was found by the Circuit Court, on the final hearing, to be something over \$2,300. (R., p. 96.) Mr. Hoffman took active control of the work, managed it and was compelled to, and did, furnish the funds necessary to carry it on. For this purpose he paid into a fund something over \$10,000 in money and provided a plant which made the amount advanced by

him something over \$15,000. The contract with the city provided that monthly estimates should be made of the work done, and that on the 20th day of the following month the money earned in the preceding month should be paid to the contractor, less 10 per cent. retained for the protection of the city. The testimony shows that active work of laying the pipe commenced about the first of June, 1893. Mr. Hoffman made his contracts, as it would seem, for his labor and supplies, by which he bound himself to make payments on the 20th of each month succeeding the month on which the labor was performed or the supplies furnished. In making these contracts he relied upon the engagement of McMullen to furnish his share of the money required above the amount received from the city. It may be presumed that he did this for the reason that payments promptly made would enable him to purchase supplies greatly to the advantage of the contractor, and the same is true of the labor employed. He was conscious that the amount of the estimates would be small in the early part of the work, and that funds would then be necessary, if ever. The correspondence between himself and McMullen shows that in Hoffman's opinion \$20,000 would be necessary to properly carry on the work. Of this sum, as before stated, Hoffman paid \$10,000 into the treasury, and called upon McMullen to pay in a like sum. McMullen, in reply to Hoffman's appeal, responded by admitting his liability, insisting upon his inability to pay or to comply with his acknowledged obligation, and never did, in fact, pay any sum whatever to be applied in the prosecution of the work.

In the early part of September, 1893, Hoffman was called before the water committee and notified by them that they had been unable to sell bonds, had no means of knowing when sales would be effected and that they were without sufficient funds to pay bills which would fall due

on the 20th. Hoffman was without sufficient funds to meet the obligations which would fall due on the 20th. He wrote to McMullen informing him that unless he should pay into the business \$10,000 by the 20th of September he should be compelled to refuse longer to recognize him as a partner in the work, and must look about and find, if he could, some one who would furnish the necessary funds. McMullen replied on the 14th of September that he could not raise the money, entered into a long criticism of Hoffman's management of the business, repeated what he had said on several occasions before that Hoffman was not properly managing the business, for the reason that he arranged to pay bills as they fell due, without regard to the amounts received upon estimates, insisted that instead of making his contracts good he ought to *stand his creditors off*, make them go without their pay indefinitely, or until the money could be received from the city, although he knew that the lines upon which Hoffman had conducted the business were to have no overdue debts, but to pay as he had contracted to do. On receipt of this letter, and on the 16th day of September, Hoffman again wrote McMullen notifying him that unless the money, \$10,000, which was needed for the purpose of meeting bills due on the 20th, and which was due from McMullen as his share, though much less than Hoffman had put into the enterprise, was paid by the 20th, he would understand that after that date Mr. McMullen would not be recognized as a partner in the work. Mr. McMullen responded to this letter on the 18th, denying Hoffman's right to dissolve the partnership, again entering into an extensive criticism upon the manner in which Hoffman had conducted the work. The correspondence will show that McMullen repeatedly acknowledged his obligation, and it will also show that instead of paying the money as he agreed to do, he harassed Hoffman by long lectures in

the way of advice, much of which contemplated Hoffman's acting with total disregard to his contracts, and urged that he supply the place of money by *standing his creditors off*. It ought to be said in this connection, in justice to Mr. Hoffman, that the time this work was being carried on, in the summer of 1893, was one of the most critical times ever known in the history of the Pacific coast. The business of the whole country was prostrated, which brought, by a financial panic, almost every industry to a standstill. Manufacturing establishments ceased operations and the laboring classes were unable to procure employment; the streets were full of idle men clamoring, not so much for bread as an opportunity to earn it. Under such circumstances for an employer of men to have given the least opportunity for the belief that they would not receive their pay at the end of the month or week would have been a serious menace to his personal safety. A failure to pay these men who had seized upon this only opportunity to procure bread for their families would have placed the very life of the employer in extreme hazard. Besides this, as stated, Hoffman already had \$15,000 of his own money invested. He was bound in a bond to the city for \$140,000 more, if he failed to perform his agreement. This last he would not be required to pay, of course, if his failure to perform resulted from the city's default. But to lose what he had already put in, and to hazard what might come as a result of a failure from his obligations to subcontractors was a source of such trouble to Hoffman as nobody could describe but himself. Unfortunately for him, and the real truth of this case, an accident snatched his life away and changed him in an instant from an active, vigorous, healthy, intelligent man to a corpse. The fact of his death has left the way to Mr. McMullen free and unobstructed to put such construction upon the relation of the parties which were known only to themselves, as Mr. McMullen sees fit.

It is within the observation of all men, particularly those who are engaged in the practice of the law, that the interested survivor generally has a convenient faculty for remembering with great precision what is to his own interest and with equal facility forgetting what happens to be against him. There are circumstances in this case which plainly show that Mr. McMullen is no exception to this class of survivors.

The attention of the court is respectfully called in this connection to the correspondence between McMullen and Hoffman, quoting only such portions of the correspondence as refers directly to the matters of money, but respectfully suggesting that a reading of the entire correspondence will be very instructive for the purpose of showing the actual conduct of these parties and the motive which finally actuated Mr. Hoffman to make the defense which this record presents.

Under date of June 6, 1893, McMullen writes Hoffman (Record, page 548): "With regard to money matters, Lee, I expect it will take a little money to run the job the first few months, until we begin to get decent estimates, but I do not think it ought to take a great deal if we keep old man Smith's estimates up full and prompt." The letter further proposes that Hoffman join with McMullen in a note for the purpose of raising money to carry on the job. On the 9th of June, 1893 (R. 575), Hoffman writes McMullen thus: "About money matters: I do not care to borrow any money, as I have my money all provided for; anyway, I doubt very much if we could raise money on notes until the scare blows over a little. I think it will require about \$20,000 to carry this work along." On June 15, 1893, McMullen writes Hoffman (R. 549): "I did not think it would take so much money to carry that job as the amount you mention. I do not think so now. I do not understand that you proposed to pay everything each month until you get your estimates for the preceding month; then, as you get 90 per cent. of what you do, it seems to me that we ought to run the job after we get it

started and the plant and camp on the ground. Later on I shall not be so hard up, but for the next two or three months I shall not have a dollar to put into anything." Replying to this letter under date of June 20, Hoffman writes (R. 576): "About money matters: You don't seem to think it will take \$20,000 to carry this work; I do, as we have to pay for our rivets, gates, valves, etc., as they arrive and get payment as they are put in place; of course, I am not going to pay out any more money than I can help. It is out of the question to raise any money up here from the banks at present. However, I am in hopes the scare will soon let up and the banks will let out money again."

On the 6th of July, McMullen writes Hoffman (R. 551): "I hope you are in position there to handle that business for the first three or four months; after that time I think we will be in shape to stand in and pay our part of what may be needed. I am willing to pay any interest that you think reasonable, and am also willing to put up my individual or the bridge company's note to guarantee the payment with any bank there, if you so desire. Of course, I know that you are running the job with just as little cash as possible. I thought, however, that Smith would allow us estimates on the rivets and fittings on their delivery in Portland. I need not tell you what you already know; that is, there is a great deal in keeping your estimates up full, and getting in everything. Neither do I wish to interfere with your method of doing business, as everybody has their own way, but if I were running it I would not pay anything on account of it except my contracts and labor till I was in easy circumstances; in other words, I would make the people carry me with whom I did business. That is what we do. . . . Now, Lee, I do not want you to think that I want to fall down or go back on you. I believe that you know that *we did our part in getting the job*, and before we get through I am satisfied that you will concede we have done our part *towards executing it*."

Replying to McMullen's letter of July 6 (R. 577), Hoffman writes: "Now, Mac, I have put in this work just \$10,000 outside of my tools and outfit, and by the first of the month we will have to pay our payroll, rivet and other

bills, all told amounting to at least \$4,000 or \$5,000. We have now on the way trestles and valves, iron for bands, etc., which will all have to be paid before we get another estimate. We have got an estimate of \$5,000 all told, for pipe laid and trenching, of this amount \$1,900 for trenching. By the time we pay W. & Z. and the hauling we will only have \$3,500 to pay bills with. Now, Mac, I don't feel like carrying this work alone, and as for borrowing money on my note, I don't think it could be done; in fact, you cannot borrow money here at all. I am in the same boat you are in. I have got money coming to me, but cannot get it. *I am not finding any fault with your part of the work of getting the contract, but you must understand that we did some work and have been working ever since, and am willing to do my part, but I cannot afford to do it all;* therefore, I must ask you to put in your half of what it takes to run this work. I have started a separate bank account, Hoffman & Bates, and I put in \$10,000, and I have not changed my mind as to the amount it will take to carry this work (\$20,000) on in good shape, and I still think we are going to make good money out of the contract, but it requires a great deal of watching."

Replying to the letter of July 14, McMullen says, under date of July 22 (R. 553): "Now, Lee, with regard to money: *I recognize that it is incumbent upon me to put up half the money to run that job with,* and I stand ready to do anything that it is possible for me to do, but for the last 60 days I have had all I could do to get along, and it does not look a bit better for the next 60 days to come: after that time we will begin to get in some money." Mr. McMullen follows this by a proposition to borrow money in Portland by Hoffman joining him and he using the credit of the San Francisco Bridge Company.

Under date of September 11, Hoffman writes McMullen as follows: "J. McMullen, Esq., San Francisco, Dear Sir: The water works contract is very much mixed up. Last Thursday the committee held a meeting and called me in and there told me they had no money to pay me on the 20th of this month, and told me they did not know if they could sell the bonds or not and I could keep on or stop as

I chose to do. I insisted that it was for them to say if I should go ahead or not, as they had a right to stop the contract, but I did not, as it would involve me with my subcontractors, but they would not tell me to stop, so I had to keep on. Our estimate is \$66,000, and they have \$40,000 that they are going to divide equally among all the contractors, so we will get about \$20,000, and after paying Wolff & Zwicker and Cook & Kiernan their pro ratio we will have about \$9,000 left to pay about \$22,500 payroll, station men included, besides iron gates and supplies besides, this month. Now, Mac, I am compelled to insist that you raise your proportion of this money, as I will absolutely not carry this work any longer this way. You will either have to put up your share of the money or let go of the contract, as you agreed to do. I have held off as long as I could with the hope that I could swing it alone, but I cannot do it any longer. I don't want you to think that I am taking advantage of the hard luck you are in, but you can see the necessity of having money. If you will furnish \$10,000 by the 20th I will carry on the contract the same way I did before, but this amount I must insist on your furnishing, or you must let go, and I will get some one in that will furnish part of the money. I still think we will make some money. We are not going to make very much, but we will make some if we don't have too many leaks after we get the water turned on. Now, Mac, I don't want you to think that I want to take advantage of you, because I don't, and if it was you that was doing this work and I could not do my share I would not ask you to do for me. If I could do this alone I would, but I absolutely can't do it. Please let me hear from you at once, as I must do something with this work before pay day. Yours truly, Lee Hoffman."

A letter written by Hoffman to McMullen on the 31st of July, 1893 (R. 209), was not inserted in its place in this correspondence, and I will insert it here. "Now, Mac, I want to tell you once more about the money matters up here. I have now put into this thing \$15,100 in cash, and tomorrow there will not be a dollar left to pay our bills as we always have done heretofore. Now, there is no use of your repeating the proposition to borrow money up here,

as your bridge stock and all the collateral I have got with your notes attached would not borrow \$20,000, nor would I undertake to raise \$5,000 here now, nor could we have done so within the last forty days. *It is a good deal for you to ask of me to take this work and run it and furnish all the money, and not do anything else.* You are taking work all over the country, putting your money into other work, and I cannot do anything but set here and manage this job. The water committee have not yet sold their bonds, and if they should fail to sell them I would have less than \$20,000 to pay for work performed this month. Now, Mac, I am willing and ready to live up to my agreement in this contract, and you must do the same. I don't feel as if I was treated right in the matter; we went into this thing together; you agreed to put up your part of the money, and I agreed to put up my portion and arranged for it. If you will put up \$8,000 cash, in addition to the plant furnished, I will try and carry the work along, but this amount I must have not later than the 5th, as I must use part of my money in other places by that time. Please let me hear from you on receipt of this."

Replying to the letter of July 31st, McMullen, on the 3d of August, writes (R. 555): "It is not possible for me to make the remittance you demand. Were it, you would not have to demand it. It is possible that I may be able to send you \$5,000 next week; this, however, will depend on whether we succeed in making a certain collection. I can only tell you that I will do my utmost to furnish some funds to help handle that job, and for what money and time you put into the job more than I do, I trust I shall be able to make you a satisfactory compensation. *I think you are too sensitive about paying everything when it is due;* no one here does that these times. I will tell you what I do in my business: When I have money I pay, and when I do not have money, I tell the people so and let them wait, and people with ten times the money and resources that I have treat me in the same way. Our labor is the only thing that we strain a point to meet promptly. Had I been running that job, everything I bought for it I should have agreed to have paid when I received my estimates on it—when it went into the work. A firm with

your credit could readily have done this. This is what we do invariably. *It, as you intimate, the city should not pay it seems to me that would be sufficient reason for you not paying, and you ought not to be worried on that score. It is hardly fair for you to intimate that I asked or expected you to furnish all the money and do nothing but run that job,* after I had explained to you that I was utterly unable to send you any money at this time. . . . *I realize it is not the explanation that you want; that it is money, and I will try and see what I can do. Meantime, stand them off."*

McMullen also writes to Hoffman on the date of August 4, 1893 (R. 558), and says: "About money, Lee. I feel just as bad and just as much annoyed at being unable to do my part as you do. I have been rustling today to see if I could not raise a loan, but thus far I am unable to do so. I have some hopes of getting \$5,000 next week. . . . If I get this money I will send it to you, although I am awfully hard pressed on every side here. *I think you are very foolish to try to meet every payment promptly there.* I would stand them off for everything, or pay them 50 per cent., or whatever I could out of my estimates, and such things as supplies for camps *I would not pay for six months if I did not feel like it.* Now, do not construe anything I have said as wanting to run the job, *but I think you are too thin-skinned and too sensitive about this paying."*

McMullen, under date of 14th of September (R. 558), in replying to Hoffman's letter of the 11th, in which Hoffman notifies him that he must put up \$10,000 by the 20th or go out of the contract, starts out with giving to Mr. Hoffman his idea of the proper solution of the financial difficulties in the matter of the pipe line contract, and on page 559 he uses this language: "If you have freight bills or contract obligations to meet which could not be stood off, would advise taking further bonds and hypothecating them as above suggested and meet such obligations. . . . My own finances are in such a condition that it is absolutely impossible for me to comply with your request to furnish you \$10,000 before the 20th of this

month. Neither can I accede to your proposition that I should withdraw from and surrender my interest in the contract. Neither have I ever intimated that I would do so, as you imply in your letter, except in my letter to you of March 14, 1893; to the proposition contained in this letter I am still open; or if you desire to make me an offer for my interest in this contract, I am open to the proposition."

Under date of the 16th of September, and replying to McMullen's letter of the 14th (R. 580), Hoffman writes McMullen as follows: "J. McMullen, Esq., San Francisco. Dear Sir—Yours of the 14th at hand and contents noted. Now, Mac, there is no use for you to tell me how to do business. I have done business here for a number of years to suit me, and shall keep on, if possible. It is all very well to tell me what to do if you are in San Francisco, but I am here and know just what is wanted. Now, I want to tell you once for all that unless you put up your share of the money, namely, \$10,000, by the 20th of this month, I shall not recognize you in this contract after that date, and shall make such arrangements as I see fit. If the San Francisco Bridge Company has got the credit you claim it has, and I have no doubt but what it has got just what you say it has, San Francisco is the place for them to raise money to carry on their portion of this work. You seem to raise money enough to carry on the Spokane and Yakima work, but you can do nothing for this. Now, there is no use of talking this matter over any further. I have told you what I want you to do. If you want to take this work and run it, you can do so. I will put up my portion of the money. But I draw the line on that. Hoping to get your share of the money by the time specified, I am yours, very truly, Lee Hoffman."

To this letter McMullen replied, under date of the 18th of September (R. 560), in which he continues his lecture to Hoffman upon the manner in which the work has been conducted, criticising his course of action and finally notifying Mr. Hoffman that he will not consent to withdraw from the contract.

No further correspondence took place between McMullen and Hoffman. McMullen simply denied Hoffman's right to dissolve the partnership or force him out of the contract. McMullen swears, but not with great confidence, that he was out upon the work after his letter of the 18th of September; that he was there with Hoffman, a proposition which is probably untrue, and one of the things which McMullen might safely assert, being conscious that Hoffman was dead and could not contradict it. That he may have been on the work after that date is not improbable. Hoffman had no control over his actions; but that he was there with Hoffman or taking any part in the business is entirely improbable.

The correspondence just quoted shows how persistent Mr. Hoffman had been in his appeals to McMullen to perform his part of the agreement, and to pay in the money necessary to carry on the work. Hoffman explained the necessity for the money and literally begged McMullen to furnish it. He assured him that there was likely to be profit if the contract was executed, but he assured him at the same time that in order to carry it on money was required. This McMullen admitted. He knew also that Hoffman had paid in his proportion of the money required to carry on the work, and that it was being carried on with that money and could not have proceeded without it. All that McMullen did in the way of furnishing money in response to Hoffman's appeal for it, was to admit his liability, offer his own note and that of the San Francisco Bridge Company as security for loans, in which he required the aid of Hoffman's name, and upon which he was unable to borrow a dollar, and so far as the San Francisco Bridge Company was concerned, was, as shown by McMullen's own testimony, in the hands of a receiver at a period not long after this offer was made. Hoffman had already furnished in cash the money he was required to put in, and

now McMullen demanded the aid of his name for the purpose of securing McMullen's proportion and upon security which McMullen himself could not procure a dollar. When the crisis finally came and Hoffman found himself confronted with demands which must be met on the 20th of September, and when notified by the committee that bonds could not be sold and not sufficient money was in hand to pay estimates which would fall due on that day, Hoffman was driven to the necessity of attempting to make provision elsewhere. He did what any reasonable business man would have done. He notified McMullen that if he, McMullen, was unfortunate in not being able to raise his proportion of the funds necessary to carry on the work, that should not result to the injury of Hoffman, nor should it be an excuse why Hoffman should take the great responsibility that rested upon him to carry on that work and divide the profits equally with McMullen. He gave McMullen full notice of the situation. He begged him to respond and to make good his promise, and finally adopted the only course open to him, and that was to dissolve their partnership. The actual condition of affairs between the 1st and 20th days of September is fully described in the testimony of Mr. F. T. Dodge, beginning on page 404 of the record, and of Mr. Henry Failing, page 414. It was while the condition of things there described prevailed that Mr. Hoffman was in the greatest distress, and during all the time he had not the faintest grounds to hope or reason to believe that the city would come to his relief, and it was while that condition prevailed that he put an end to the partnership between himself and McMullen. McMullen's conduct in the premises indicated his acquiescence in Hoffman's action, although in his letter of the 18th of September he denied Hoffman's right to in any way affect his claim to, or interest in, the contract. It is true that after this proceeding had taken place, and, unexpectedly to all

parties, a sale was effected of the city's bonds and money was provided to meet the estimates for the 20th of September, and it is also true that thereafter no difficulty was experienced by the city in the sale of the bonds, and money sufficient to carry on the work provided by the city. But after the dissolution of the contract McMullen made no application to Hoffman to be reinstated, in fact, said nothing, did nothing, concerned himself with nothing whatever but his own business for a period of more than sixteen months, during which time Hoffman, by the closest attention, carried the work to such a point of completion that the pipe line was turned over to the city for the six months' test provided for by the contract of construction. At this point, Mr. McMullen comes upon the scene, marches into the office of Hoffman and apparently with the authority of a feudal lord, demanded of Mr. Hoffman that the books relating to this contract be turned over to him for inspection, demanded an accounting and insisted that he was entitled to one-half of the profits which had resulted from the venture in which, according to his own showing, he had not then a dollar at stake, the money for the plant he had furnished and the tools he had purchased having been tendered to the San Francisco Bridge Company by Hoffman before this demand was made, but which Mr. McMullen said had not been accepted for the reason that the parties were at that time in the hands of a receiver. *The chief service rendered by Mr. McMullen as the basis for his claim was that which he had rendered in procuring the contract,* and this the record shows consisted in the skill with which he had conceived schemes and the energy with which he executed them, which resulted in securing a contract with the city in the name of Hoffman & Bates, which contract, because of these same schemes and his same energy, was illegal and void.

When Hoffman refused this demand and proposed to

make some arrangement with Mr. McMullen for compensating him liberally for what he had done in the premises, McMullen indignantly rejected the proposition unless the books were submitted for his examination, and brought this suit. Hoffman was compelled to defend it. In doing so he necessarily laid his whole case before counsel and asked their opinion as to his legal right. Counsel were bound to state what, in their judgment, was the rule of law applicable to such a case. One of the conclusions reached was that this contract of partnership, being unlimited in its duration, might be dissolved by either party at any time, being liable for damages resulting from the dissolution, if wrongful. They were further of the opinion that if, for any cause, the court should find that the contract of partnership was limited in time, either party might still dissolve it, being liable, however, if the dissolution was wrongful, for the damages caused thereby. A recital of the facts of the case fully and completely, as they were afterwards stated in the respondent's answer, forced counsel to the conclusion that all the contracts or pretended contracts that had resulted from the combination between these two men were against public policy and absolutely void, and that the plaintiff could not recover, even if the partnership had never been dissolved. It is under circumstances like these that Mr. Hoffman is placed before the court in the position of one in whose mouth one of the defenses here made always sounds ill. It is no part of the purpose of counsel for defendant to excuse or justify the acts of Hoffman in forming the illegal combination into which he entered for the purpose of despoiling the city. But the statement is made, and the defense urged by counsel, for the reason that it is a correct representation of the facts in the case, and, ill as the defense may sound, an inquiry into the facts shows it was not interposed to deprive McMullen of a dollar justly due him, but to secure to Hoffman what he

had earned by his own energy and with his own capital.

In support of the proposition that a partnership between two or more persons which is not limited as to its duration may be dissolved by either of them at any time the following cases are cited:

- Skinner v. Tinker, 34 Barb. 333.
- McEvery v. Lewis, 76 N. Y. 373.
- Fletcher v. Reed, 131 Mass. 312.
- Blake v. Sweeting, 12 N. E. 67 (Ills.).
- Walker v. Whipple, 58 Mich. 476.
- Solomon v. Kirkwood, 55 Mich. 256.
- 3 Kent's Com., 53.
- Jacob C. Slemmer's Appeal, 58 Pa. St. 168.
- Carlton v. Cummings, 51 Ind. 478.
- Lawrence v. Robinson, 4 Col. 567.
- Pine v. Ormsby, 2 Abb. Pr. 375.
- Berry v. Folkes, 60 Miss. 576.
- Whiting v. Leakin, 66 Md. 255.
- Blaker v. Sands, 29 Kan. 551.
- Mason v. Connell, 1 Whart. 381.
- Skinner v. Dayton, 19 Johns. 531.

In *Solomon v. Kirkwood*, 55 Mich. 256, the Supreme Court of Michigan said: "The right of a partner to dissolve, it is said, is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the contract as to all future contracts, . . . the only consequence being that he thereby subjects himself to claim for damages for a breach of his covenant."

The partnership agreement disclosed by the record in this case, whether it be regarded as having been entered into in 1891, or in 1893, is not limited in its duration. The agreement between Hoffman and Catt in 1891 embraced any and all work which might be let by contract for bringing Bull Run water to Portland. It was not limited as to

its duration. It was impossible to tell how much of the work would be secured or how long a time would be required to perform it, if secured. The writing signed by the parties in March, 1893, referred especially to the contract which had been awarded to the parties in the name of Hoffman & Bates, and then in term provided for what was included in the original contract of 1891 by saying that they would share in the profits of any contract which they might get for doing any other work for bringing Bull Run water to Portland. McMullen's own evidence shows that Hoffman and McMullen made very strenuous efforts to secure the contract for the submerged pipe, going so far as to undertake to buy off all opposition or *to take them in* so as to get the largest sum possible out of the city. At the time the writing of March 6 was signed the San Francisco Bridge Company stood upon the records of the water committee as the lowest bidder for the submerged pipe, and there was a great desire on the part of McMullen to secure the contract on that bid. McMullen says that there are \$20,000 or \$25,000 profit in it if they can only secure it upon the bid already presented. Therefore, it seems plain that the partnership agreement was one which Hoffman had a right at any time to dissolve, and that he did in fact dissolve it. The rule laid down in the case of Slemmer's Appeal, 58 Pa. St. 168, is that: "It is in the power of one partner to withdraw at any time and thus cause a technical dissolution of the firm subject to liability to his co-partners if the act was wrongful." This language is not confined to cases where the partnership is not limited in its duration, but to all partnerships. The remaining partners may have their remedy in such case if the dissolution was wrongful. That remedy McMullen might have had here if the dissolution was wrongful and if he had been able to come into court with a contract not void because illegal.

Hoffman having dissolved the partnership, whatever was earned from it after the dissolution McMullen had no

claim upon. Whatever interest he might have had in it, or whatever claim he might have had upon any profits which may have accrued prior to the dissolution, he might have maintained an action against Hoffman to recover but for the fact that the contract upon which such a claim is based is illegal and void.

The Circuit Court, upon the final hearing of this cause, recognized the partnership between Hoffman and McMullen as continuing, and based that conclusion upon one single fact. During the progress of the work Hoffman regularly charged against the contract one thousand dollars a month for his services as manager. This circumstance the judge of the Circuit Court construed into a recognition of the partnership, and in delivering the opinion the court says (R. 101): "There was such an entire failure on McMullen's part to fulfill his obligation in the contract that Hoffman would, in my judgment, have been justified in treating it as abandoned by McMullen, and this was threatened. It is only from the fact that Hoffman continued to recognize McMullen's relation in the business by regularly charging for his own services that I am justified in treating the partnership relation as having continued. The entire burden is upon Hoffman, and it involves not only the conduct of the business of constructing the work, but all the money responsibility that attached to it, and this goes to increase the amount to which Hoffman is in good conscience entitled for his services, on which account he is entitled to be paid at the rate charged." It is apparent that the learned judge entirely misapprehended the foundation upon which this charge of \$1,000 a month for the services of Hoffman as manager was based. It had no relation whatever to the partnership as such. It related to, and formed a part of, the expenses of the contract, and, as any business man would have done, it was charged against the contract, and not against the

partnership. It was a charge necessary to be made for the purpose of showing the profit, because the hire and salary of a manager is as much a legitimate charge, not against the profits, but against the receipts, as an expense of performance, as is the hire of a man who handles a pick or a shovel. Exactly the same charge would have been made, in exactly the same way, if Mr. Hoffman had been alone concerned in the execution of that contract from the beginning. That circumstance alone induced the judge at the Circuit to hold that the partnership had not been dissolved, though in his opinion Hoffman had ample grounds for its dissolution. I am impressed that if this cause should proceed in this court to a point where that question must be considered it will correct the error into which the Circuit Court manifestly fell, and will hold that Hoffman, as a matter of fact, dissolved this partnership, and if McMullen can recover anything it will be limited to the value of his interest in the contract with the city at the time of the dissolution, and any profit that may have then accrued. What these were could only be ascertained by a further accounting, because nothing in the record shows.

McMULLEN'S APPEAL.

The first assignment of error presented in plaintiff's brief, under this head, is that the allowance made by the court of \$20,000 for the services of Hoffman as manager of the work done under the contract is too much. It hardly seems necessary to take any time to notice the points made in this appeal. The conclusions reached by the court are based upon findings of fact which I do not understand this court will undertake to review, especially upon such questions as are suggested by this appeal. The testimony as to the value of the services of Hoffman is quoted at considerable length in counsel's brief, and I only desire to say that the witnesses called were known to the judge

of the court, and he was best prepared of anybody to judge of their credibility. The concluding paragraph of the opinion upon the final hearing of the cause (R. p. 102) furnishes ample reason for the conclusion at which he arrived upon that point. He says: "The entire burden was upon Hoffman, and it involved not only the conduct of the business of constructing the work, but all the money responsibility that attached to it, and this goes to increase the amount to which Hoffman is in good conscience entitled for his services, on which account he is entitled to be paid at the rate charged. It seems to me that this objection comes with an ill grace from McMullen. Hoffman's entire time was devoted to this business, while McMullen had at his own disposal all his time to carry on any business in which he felt inclined to engage. This is especially true when it appears, as it does here, that by Hoffman's skillful management he added in the way of profits from a store and eating-house which he established for the purpose of more successfully carrying on the work, an amount almost if not quite equal to the entire sum charged by him for managing the business, and, besides this, carried the business when McMullen had not risked a dollar in the enterprise. Authorities are cited for the purpose of showing that compensation is not ordinarily allowed to the members of a partnership in the conduct of their business, without an agreement to that effect. Whatever the rule may be, it has no application to this case, for the plaintiff himself prays that the court shall allow compensation as he thinks according to equity. Counsel says that this prayer was inserted into the bill upon the hypothesis that McMullen would be allowed compensation for his services as well as Hoffman. Whatever his intention might have been, he could not recover anything for two reasons. The first is that he did not make proof of any right to compensation, and in the next place he submitted to the court the ques-

tion of what compensation he should receive, and the court has not found that he is entitled to anything.

Another claim of the plaintiff in his appeal is that McMullen was entitled to interest on certain money received by Hoffman. That is a question which was submitted to the Circuit Court, was fully considered by it, and it found that upon the facts of the case and in equity and good conscience McMullen was not entitled to interest. It must have found that he was quite well paid for all that he had done when in the final decree the court ordered that there be paid to him \$50,000 in the procuring of which he had scarcely risked a dollar or performed any valuable service. That, under the circumstances, Hoffman ought not to be charged with interest, although under different circumstances it might have been properly chargeable. But the true rule is as laid down in *Sweeney v. Neely*, 29 N. J. Eq. 421: "Interest can never be allowed on an unsettled or an unliquidated account without an agreement, express or clearly implied, and the case must be a very strong one when it is between partners to warrant its allowance without express agreement to that effect. We have been unable to find any understanding or agreement, either express or implied, by which either party was to be allowed interest for moneys owing to the firm from either or from the firm to either, or from one to the other, in the conduct and management of the co-partnership business before dissolution and final settlement; and in that case until that time neither is chargeable with interest on money he owes to the other or to the firm arising out of the business transactions of the company. *Cooley on Partnership*, secs. 337, 338; *Parsons on Partnership*, 3rd Ed., 229, note f.; *Lindley Partnership*, 786 and note; *Dexter v. Arnold*, 3 Mason, 284, 289; *Gilman v. Vaughan*, 44 Wis. 646; *Day v. Lockwood*, 24 Conn. 185."

Thompson v. Noble, 65 N. W. 563 (Mich.).

Matter of James, 146 N. Y. 78.

Ashbrook v. Ashbrook, 28 S. W. 660 (Ky.).

17 A. & E. Ency. Law, 1229.

These authorities are applicable to this case.

The next point made by plaintiff in his appeal is that McMullen should have been allowed costs. It is a sufficient answer to this claim that costs in such cases are within the discretion of the court. The finding of the court that the defenses were not well taken was not based upon the theory that they were frivolous, and were not made in good faith. The defense that the partnership had been dissolved was only denied upon what we think was a misapprehension of the court of the design and effect of the charge against the contract.

CONCLUSION.

It seems to me that there is no room to doubt that the conduct of McMullen and Hoffman, in securing the contract with the city, rendered that contract void as against public policy. If, after discovering the fraud, the city had refused to pay and McMullen and Hoffman had sued to enforce payment, they would have failed if the city had plead the illegality of the contract. Relief would not have been denied because the defense was made by the city, but because the contract is void and cannot have the aid of a court, by whomsoever presented. McMullen brings that contract into this court, and, basing his claim against Hoffman upon it, prays a decree that the court, by its receiver, complete it, earn whatever profits there may be, and then divide those profits between the very parties by whose unlawful conduct the contract was acquired. Not a dollar of profits had been actually earned when the pipe line was turned over to the city to be tested on the 1st of January, 1895, nor when this suit was begun in April of that year. No profits were assured until after the test had been completed. Breaks might have occurred, which would have absorbed all the profits supposed to have been earned, and

left Hoffman liable on his bond of \$140,000 for any loss in excess of the contract price, while McMullen not having signed the bond had no liability. There was no break, but the point illustrates how completely McMullen relied upon the contract with the city for the profits he seeks to recover, and shows that it is that illegal contract upon which he relies to aid his recovery. Realizing this to be the condition, he seeks by his bill, to have the court by its receiver perform what remains to be done to earn the profits, and asks the court to ascertain the amount and divide it between himself and Hoffman. The Circuit Court of Appeals held that McMullen relied upon this contract. That it was illegal and that the court would not enforce it. It cannot be that in this there was error.

The Circuit Court of Appeals also held that McMullen could no more have the aid of the court to enforce this contract because he brought it in as a member of a partnership organized to perform it, than if it were presented by him independently of any partnership agreement. That the formation of the partnership between McMullen and Hoffman did not change the character of the contract with the city, and render it valid, especially when it appears that the alleged partnership was entered into by the very same parties whose illegal conduct in procuring that contract rendered it void. The Circuit Court of Appeals held that by the mere "stroke of the pen" the parties could not avoid the legal consequence of their misconduct. There can be no error in this. The conclusions reached by that court are fully supported by the facts in the record, and the law applied to them has been established by the uninterrupted current of decisions from the very beginning of our system of jurisprudence. The Circuit Court of Appeals recognizing the rule as laid down in *Brooks v. Martin* as correct ~~and~~ regarded that case as well decided, but distinguished it from the case made by the facts in

this, and held that it did not apply here. That court refused to adopt the contention of counsel for the plaintiff that the alleged partnership agreement between McMullen and Hoffman to perform the work required to complete the contract with the city "wiped out" all the illegal effects of their own conduct by which that contract was procured. They held in effect what so forcibly expressed by Mr. Justice Baldwin in *Bartel v. Coleman*, 4 Pet., 1889, when he says: "To state such a case is to decide it. Public morals, public justice and the well-established principles of all public tribunals alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which begun with the corruption of a public officer, and progressed in the practice of known and willful deception in its execution, can never be consummated or sanctioned by any court.

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burdens which may have resulted from the violation of every principle of morals and of law."

The Circuit Court of Appeals reached a correct conclusion as to the facts in the case, and correctly applied the law to them, there can therefore be no reason why the decree of that court should be reversed. A reversal of that decree, based upon the facts shown in this case, would be most mischievous in its effects. If based upon the contention of counsel for the plaintiff, that the alleged new partnership agreement between McMullen and Hoffman "wiped out," made a "dead letter" the frauds the same parties had practiced to secure the contract with the city, and so bring the case within *Brooks v. Martin*,

the effect would be to render nugatory the unquestionable law, as it now stands and has so long stood (that illegal contracts cannot have the aid of the courts to enforce them) by opening a way through which the very rascals whose acts the law condemns, could have the aid of the court to reap the reward of their misconduct, by the trick of forming a co-partnership. If this decree is reversed there would not seem to remain any reason why any bidders, under any circumstances, may not, with impunity, buy off all competitors or practice any sort of frauds, and thereby procure a contract, and then form a co-partnership for its execution and have the same protection from the courts as is given to the worthy and deserving. The opinion of the Circuit Court of Appeals discloses how completely the real points in this case were discerned by that tribunal, and the masterly manner in which answers are made to every material contention of the plaintiff's counsel, and the reasons stated upon which its own decision rests are sufficient to warrant the affirmance of its decree, and notwithstanding the fact that this court, upon what, I take it, could only have been a casual examination of the case, felt constrained to cause the record to be brought here for review, it is impossible to feel otherwise than that, upon a full presentation of the whole case, and a careful, painstaking and deliberate examination of it, the conclusion must be reached that the Circuit Court of Appeals committed no error and its decree will be affirmed.

Respectfully submitted,

RUFUS MALLORY,

Attorney for Respondent.

DOLPH, MALLORY, SIMON & GEARIN,

Counsel for Respondent.

this, and held that it did not apply here. That court refused to adopt the contention of counsel for the plaintiff that the alleged partnership agreement between McMullen and Hoffman to perform the work required to complete the contract with the city "wiped out" all the illegal effects of their own conduct by which that contract was procured. They held in effect what so forcibly expressed by Mr. Justice Baldwin in *Bartel v. Coleman*, 4 Pet., 1889, when he says: "To state such a case is to decide it. Public morals, public justice and the well-established principles of all public tribunals alike forbid the interposition of courts of justice to lend their aid to purposes like this. To enforce a contract which begun with the corruption of a public officer, and progressed in the practice of known and willful deception in its execution, can never be consummated or sanctioned by any court.

"The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burdens which may have resulted from the violation of every principle of morals and of law."

The Circuit Court of Appeals reached a correct conclusion as to the facts in the case, and correctly applied the law to them, there can therefore be no reason why the decree of that court should be reversed. A reversal of that decree, based upon the facts shown in this case, would be most mischievous in its effects. If based upon the contention of counsel for the plaintiff, that the alleged new partnership agreement between McMullen and Hoffman "wiped out," made a "dead letter" the frauds the same parties had practiced to secure the contract with the city, and so bring the case within *Brooks v. Martin*,

the effect would be to render nugatory the unquestionable law, as it now stands and has so long stood (that illegal contracts cannot have the aid of the courts to enforce them) by opening a way through which the very rascals whose acts the law condemns, could have the aid of the court to reap the reward of their misconduct, by the trick of forming a co-partnership. If this decree is reversed there would not seem to remain any reason why any bidders, under any circumstances, may not, with impunity, buy off all competitors or practice any sort of frauds, and thereby procure a contract, and then form a co-partnership for its execution and have the same protection from the courts as is given to the worthy and deserving. The opinion of the Circuit Court of Appeals discloses how completely the real points in this case were discerned by that tribunal, and the masterly manner in which answers are made to every material contention of the plaintiff's counsel, and the reasons stated upon which its own decision rests are sufficient to warrant the affirmance of its decree, and notwithstanding the fact that this court, upon what, I take it, could only have been a casual examination of the case, felt constrained to cause the record to be brought here for review, it is impossible to feel otherwise than that, upon a full presentation of the whole case, and a careful, painstaking and deliberate examination of it, the conclusion must be reached that the Circuit Court of Appeals committed no error and its decree will be affirmed.

Respectfully submitted,

RUFUS MALLORY,

Attorney for Respondent.

DOLPH, MALLORY, SIMON & GEARIN,

Counsel for Respondent.

McMULLEN v. HOFFMAN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

No. 271. Argued April 27, 28, 1899. — Decided May 22, 1899.

The city of Portland, in Oregon, proposing to receive bids for the construction of what was called the Bull Run pipe line, Hoffman of Portland and McMullen of San Francisco entered into a contract in writing as follows: "This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one half of the expenses of executing the same, and each to receive one half of the profits or bear and pay one half of the losses which shall result therefrom. And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike." Both put in bids for the work which forms the subject of dispute in this case. Hoffman's bid was for \$465,722. McMullen's was \$514,664. There were several other bids, but Hoffman's was the lowest of all. The contract was awarded to him. He did the work and received the pay. This

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action was brought by McMullen to recover his portion of the profit, according to the contract. *Held*, that this contract was illegal, not only as tending to lessen competition, but also because the parties had committed a fraud in combining their interests and concealing the same, and in submitting the different bids as if they were *bona fide*, and that the court will not lend its assistance in any way towards carrying out the terms of an illegal contract, nor will it or any court enforce any alleged rights directly springing from such a contract.

While distinguishing *Brooks v. Martin*, 2 Wall. 70, from this case, the court holds that, taking that case into due consideration, it will not extend its authority at all beyond the facts therein stated.

THIS action was originally brought by the complainant McMullen against one Lee Hoffman, and he having died before the trial, the action was revived against the defendant Julia E. Hoffman, as the executrix of his will. When the defendant is hereinafter spoken of, the original defendant is intended.

The complainant filed his bill against the defendant, seeking an accounting of profits that he alleged had been made by the defendant upon a certain contract for the construction of what is termed the Bull Run pipe line, and which contract was entered into between the city of Portland, in the State of Oregon, and the defendant on or about March 10, 1893. The complainant bases his right to share in the profits of that contract by virtue of another contract in writing between himself and the defendant herein, executed March 6, 1893. That agreement reads as follows:

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That, whereas, said Hoffman and Bates have with the assistance of said McMullen at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid:

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"It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one half of the expenses of executing the same, and each to receive one half of the profits or bear and pay one half of the losses which shall result therefrom.

"And it is further hereby agreed that if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike.

"Witness our hands and seals this 6th day of March, A. D. 1893.

"JOHN McMULLEN. [SEAL.]

"LEE HOFFMAN. [SEAL.]"

The contract for manufacturing and laying the steel pipe was awarded to the defendant at a public letting of the whole work at Portland, of which the manufacturing and laying of the pipe was a part, and the whole work was divided into classes, and separate bids called for and received for each class.

The defendant put in bids in the name of Hoffman & Bates for several classes, while the plaintiff, in the name of the San Francisco Bridge Company, (of which he was an officer,) put in separate bids for the same classes.

The bids of complainant and defendant for the several classes of the work were as follows:

Conduit from head works to Mount Tabor of wrought iron or steel, making and laying pipe:

Hoffman & Bates.....	\$465,722 00
San Francisco Bridge Company.....	514,664 00

(The profits arising out of this contract are the subject of the controversy herein.)

Head works—

Hoffman & Bates.....	\$17,800 00
San Francisco Bridge Company.....	16,550 00

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Bridges—

Hoffman & Bates.....	\$33,562 94
San Francisco Bridge Company.....	31,279 07

Also for steel conduit for head works to Mount Tabor—

Hoffman & Bates.....	\$359,278 00
San Francisco Bridge Company.....	348,781 00

There were several other bids by different bidders for these various classes. The bid in the name of Hoffman & Bates for the manufacture and laying of the wrought iron or steel pipe from the head works to Mount Tabor being \$465,722, was the lowest out of eight bids, the various bids from the highest to the lowest being as follows:

The Risdon Iron & Locomotive Works.....	\$600,737 00
The Bullon Bridge Company.....	533,507 00
Oscar Huber.....	521,775 40
San Francisco Bridge Company.....	514,664 00
Wolff, Buener & Zwicker.....	495,682 00
Ferry Hinckle & Robert Wakefield.....	481,040 00
E. W. Jones & O. W. Wagner.....	477,552 00
Hoffman & Bates.....	465,722 00

All these bids were before the committee on the part of the city and were taken into consideration at the time the award was made to the defendant. After the acceptance of his bid for the manufacturing and laying of the pipe, the defendant entered into a contract with the city of Portland to do the work mentioned in such bid, and commenced the performance of the contract as provided for therein. The work was duly completed and the city paid defendant the contract price for the same, retaining the percentage provided for therein, as security that the terms of the contract had been fully complied with.

The complainant alleges that defendant, after securing the contract, went on with the work thereunder, but refused to permit him to participate in the profits arising therefrom or to examine the books of the partnership, and that although he (complainant) furnished some of the capital and performed

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some of the services provided for in the contract with the city, and participated in some of the expenses of the execution of the contract, and devoted some of his time and attention to the proper performance thereof, and was at all times ready to do everything required of him by his agreement of partnership, yet that the defendant received all the moneys paid by the city and absolutely refused to account to him for any part thereof, and denied that he had any interest in or right to any portion of such moneys. The complainant, therefore, asked for an accounting between himself and defendant, as partners, and for a decree for the payment to him of one half the profits arising from the contract, the whole of which he alleged amounted to \$80,000, (the courts below say the evidence shows they were \$140,000;) that a receiver might be appointed to take charge of the property of the partnership, its records, books, papers, etc., and that the defendant might be restrained during the pendency of the suit from making sale or other disposition of the tools, equipment or other personal property belonging to the partnership, and from drawing from the city of Portland the moneys withheld by it on account of the contract, as well as any other money due for other work done by the defendant under the contract of partnership.

The answer of the defendant, while denying many of the allegations of the complaint, set up as a special defence the making of an agreement between the parties, (of which the partnership agreement was a portion,) by the terms of which they were to put in bids for the construction of the work, the complainant in the name of the San Francisco Bridge Company and the defendant in the name of Hoffman & Bates; that the bids should not be in reality competitive, but should be submitted to each other before they were put in, and their terms should be mutually agreed upon, the higher bids to be merely formal, and the bids themselves as agreed upon should be delivered to the water committee; that if either party received the contract, they should both share in the profit or loss resulting from its performance, but that their mutual interest in each other's bids should not be made known when the bids were offered, so that it would appear that they were apparently

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competing for the various classes of the work and for furnishing the material, when in fact they were not. This agreement, the defendant alleged, was carried out, and the contract secured by means thereof.

The court upon motion of the complainant granted a temporary injunction as prayed for in the bill. Exceptions were taken to certain parts of the answer of the defendant as being insufficient. Material portions of these exceptions were overruled by the court upon the ground that the answer set up an illegal contract between the parties, and one which could not be enforced by either. 69 Fed. Rep. 509.

Upon the final hearing of the case the same judge, becoming convinced that he had erred in his former decision in overruling the exceptions to the answer, decided that the case as made on the part of the defendant showed no defence to the complainant's cause of action, and thereupon he made a decree for an accounting substantially as asked for in the complainant's bill. 75 Fed. Rep. 547.

An appeal from the decree of the Circuit Court was taken to the United States Circuit Court of Appeals for the Ninth Circuit, and that court held that the contract between the parties was illegal, and that no action could be maintained thereon by either, and the decree in favor of the complainant was therefore reversed. 48 U. S. App. 596. Complainant then applied to this court for a writ of certiorari to review the judgment of the Circuit Court of Appeals, which was granted May 9, 1898. 170 U. S. 705.

Mr. L. B. Cox and *Mr. William A. Maury* for petitioner.
Mr. R. Percy Wright was on their brief.

Mr. Rufus Mallory for respondent.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The foregoing statement shows that there is a difference of opinion in the courts below as to the law applicable to the

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case. The question is one of importance, involving as it does the principles which should control in regard to the procurement of contracts at public lettings for work to be awarded to the lowest bidder. Assuming the same facts, the courts below have come to opposite conclusions upon the character of the contract and upon the right of the complainant to obtain redress for his alleged wrongs.

It was on account of the general importance of the question and the many lettings for public works by the Government and by municipal corporations which are affected by the law relative to bidding, that this court thought it a proper case to issue the writ of certiorari herein. The cases upon the subject are not entirely harmonious, and we think it well to again consider some of them and so far as possible to remove the doubts which seemingly have arisen in this branch of the law.

Looking in the record before us, we find that the pleadings and proofs taken herein show that for some time prior to the 6th of March, 1893, the city of Portland intended to add to its water supply by bringing to the city the water from a creek or river called Bull Run, some thirty miles distant, and for that purpose it had issued through its water committee proposals for bids to build the works, which proposals were divided into several different classes as already stated.

The complainant McMullen, living in San Francisco and being a large stockholder in and manager of the San Francisco Bridge Company, came to Portland for the purpose of giving his attention to the matter, and if possible to make an arrangement with the defendant by which they might together become bidders for the work. He and the defendant had many interviews before the time of delivering the bids arrived, and they finally agreed that each party should put in separate bids in his own or his firm name, or in the name of his company, for certain classes of the work, but that they both should have a common interest in each bid if any were accepted. This community of interest was to be kept secret and concealed from all persons, including the water committee. Each was to know the amount of the other's bid, and

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all bids were to be put in only after mutual consultation and agreement. Bids for the various classes of work were put in as above set forth, and among them the bid for the manufacture and laying of the pipe, which was accepted by the water committee. All of them were put in pursuant to this agreement, part of them in the name of Hoffman & Bates and part in the name of the San Francisco Bridge Company. The bid in the name of the San Francisco Bridge Company for the manufacture of the pipe was nearly \$50,000 higher than the amount bid in the name of Hoffman & Bates, and was put in after consultation with and approval by the defendant. This last bid was put in, as stated by Mr. McMullen in his evidence, as a matter of form only, and to keep the name of his company before the public, but it appeared on its face to be a *bona fide* bid. The water committee received the bids in ignorance of the existence of this agreement and in the supposition that all the bids which were received were made in good faith, and they all received consideration at the hands of the committee. After the computations were made by which it appeared that the bid of the defendant was the lowest for the manufacture and laying of the pipe, the contract was awarded him, and afterwards that portion of the agreement which had been made between the parties to this combination, viz., that relating to the partnership, was reduced to writing, and is set out in the foregoing statement.

Upon these facts the question arising is whether a contract between the parties themselves such as is above set forth is illegal? In order to answer the question we would first naturally ask what is its direct and necessary tendency? Most clearly that it tends to induce the belief that there is really competition between the parties making the different bids, although the truth is that there is no such competition, and that they are in fact united in interest. It would also tend to the belief on the part of the committee receiving the bids that a *bona fide* bidder, seeking to obtain the contract, regarded the price he named, although much higher than the lowest bid, as a fair one for the purpose of enabling him to realize reasonable profits from its performance. A bid thus made

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amounts to a representation that the sum bid is not in truth an unreasonable or too great a sum for the work to be done. We do not mean it is a warranty to that effect or anything of the kind, but simply that a committee receiving such a bid and assuming it to be a *bona fide* bid would naturally regard it as a representation that the work to be done, with a fair profit, would, in the opinion of the bidder, cost the amount bid. Hence it would almost certainly tend to the belief that the lower bid was not an unreasonably high one, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting. The fact that there were other bids even higher than that of the San Francisco Bridge Company, for the manufacture and laying of the pipes, does not alter the tendency of the agreement when carried into effect, to create or to strengthen the belief on the part of the committee in the fact of an active competition and the *bona fide* character of that competition, and that the lowest bid would be in all probability a reasonable one. It is in truth utterly impossible to accurately or fully predict all the vicious results to be apprehended as the natural effect of this kind of an agreement. It cannot be said in all cases just what the actual effect may have been.

The natural tendency and inherent character of the agreement are also unaffected by any evidence produced on the part of the complainant, that the chairman of the water committee had, when examined nearly three years after the occurrence, no recollection as to the bid of the bridge company or that it had any particular effect upon his mind, and that he said that the contract was awarded to the lowest bidder simply because he was the lowest bidder, and without reference to the bid of the bridge company.

The question is not whether in this particular case any member of the water committee did or did not remember the fact that the bridge company had made a bid or that such bid had no effect upon his mind. The question is not as to the effect a particular act in fact had upon a member of the water committee, but what is the tendency and character of the agreement made between the parties; and that tendency

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or character is not altered by proof on the part of a member of the committee, given several years afterwards, that he had no special recollection that such a bid had been made. The evidence is that all the bids that were given received the consideration of the committee, and there can be no doubt that the more bids there were, seemingly of a *bona fide* character, the more the committee would be impressed with the idea that there was active competition for the work to be done.

It might readily be surmised that if these parties had bid in competition, one or both of the bids would have been lower than their combined bid. It was not necessary, however, to prove so difficult a fact. The inference would be natural.

In *Richardson v. Crandall*, 48 N. Y. 348, 362, the court said: "In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The laws look to the general tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate," citing *Atcheson v. Mallon*, 43 N. Y. 147.

Although these remarks were made when the court was dealing with the case of a bond taken *colore officii*, yet the principle applies equally to a case like the one at bar, and indeed it is seen that such was the view of the judge delivering the opinion, since he cited *Atcheson v. Mallon*, which in its nature is a case very similar to the one now before us.

The vice is inherent in contracts of this kind, and its existence does not in the least depend upon the success which attends the execution of any particular agreement.

In *Tool Company v. Norris*, 2 Wall. 45, 56, the court said, in speaking as to illegal agreements:

"It is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution."

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And in *Rex v. De Berenger*, 3 M. & S. 67, 72, cited in *Scott v. Brown*, (1892) 2 Q. B. D. 724, 730, Lord Ellenborough, C. J., said:

"A public mischief is stated as the object of this conspiracy; the conspiracy is by false rumors to raise the price of the public funds and securities; and the crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete, although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price by means of false rumors, it is a fraud levelled against all the public, for it is against all such as may possibly have anything to do with the funds on that particular day."

Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description or the force of the public policy which condemns them.

In the case at bar the illegal character of the agreement is founded not alone upon the fact that it tends to lessen competition, but also upon the fact of the commission of a fraud by the parties in combining their interests and concealing the same, and in submitting different bids as if they were *bona fide*, when they knew that one of them was so much higher than the other that it could not be honestly accepted, and when they put it in for the sake of keeping up the form and of strengthening the idea of a competition which did not in fact exist. The tendency of such agreements is bad, although in some particular case it might be difficult to show that it actually accomplished a fraud, while its intention to do so would be plain enough. Therefore, when it is urged that these parties had no intention of bidding for this work alone, and that unless they had combined their bids neither would have bid at all, and hence the agreement between them tended to strengthen instead of to suppress competition, this answer to

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the illegality of the transaction is insufficient. The evidence, however, does not show that if these parties had not agreed upon a combination neither would have bid alone. It shows the complainant came to Portland to see the defendant and to conclude their arrangements to go into the combination, but we are by no means of the opinion that the evidence shows that if they had not combined they would not have bid at all. Complainant's company had bid alone at a prior letting, some time before, and had then been the lowest bidder for the contract, which the city did not award because of a lack of means of payment for the work consequent upon a veto by the governor of the bill providing for the issuing of bonds to make such payment. And it seems that the defendant himself was well able to carry on the contract alone.

If it be granted that the fact was proved that neither party would have bid separately, and that by virtue of the combination a bid was made which otherwise would not have been offered, the significance of the other facts in the case is not thereby altered. Those other facts are the concealment of the interest which the parties had in each other's bids, and the making of what were under the circumstances nothing more than fictitious bids for this and the other classes of work for which both parties put in bids, evidently for no other purpose than to endeavor thereby to deceive the committee into believing that there was real competition between them, when in fact there was none. If there had been competition, the bid of each for the contract that was obtained might very likely have been lower than the one that was accepted. It is not necessary to prove that fact in order to show the nefarious character of the agreement.

The reason given for the making of these fictitious bids by the complainant, that it was a formal matter and to keep the name of his company before the public, is entirely inadequate. The bids actually put in by them for the other classes of work had the same tendency to strengthen belief in the reality of the competition which in fact did not exist between these persons. The whole transaction was intentionally presented to the water committee in a false and deceptive light.

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Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and *bona fide* bids. Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals, but who in truth are secretly banded together for the purpose of obtaining contracts from public bodies such as municipal and other corporations at a higher figure than they otherwise would. Just how the fraud is to be successfully worked out by the combination, it is not necessary to show. It is enough to see what the natural tendency is. Public policy requires that officers of such corporations, acting in the interest of others, and not using the sharp eye of a practical man engaged in the conduct of his own business, and not controlled by the powerful motive of self-interest, should, so far as possible and for the sake of the public whom they represent, be protected from the dangers arising out of a concealed combination and from fictitious bids.

To hold contracts like the one involved in this case illegal is not to create any new rule of law for the purpose of affording the protection spoken of. It is but enforcing an old rule, and applying it to such facts as exist in this case because it naturally fits them. Its enforcement here is to but carry into effect the public policy upon which the rule itself is founded. People who have been guilty of the conduct exhibited in this record cannot be heard to say that although their arrangement was fraudulent and illegal, they would nevertheless have obtained the contract even if they had not been guilty of the fraud, because the bids show they were the lowest bidders. The bids might have been lower yet if there had been competition where there was in fact combination. The parties must accept the consequences resulting from entering into the agreement proved in this case, all of which they carried out, and included in which and as a consequence thereof was the agreement with the city and the written agreement of partnership between themselves.

In *Hyer v. Richmond Traction Company*, 168 U. S. 471, in

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speaking as to the character of the agreement in that case, Mr. Justice Brewer remarked that the vice of a combination "lies in the fact of secrecy, concealment and deception; the one applicant, though apparently antagonizing the other, is really supporting the latter's application, and the public authorities are misled by statements and representations coming from a supposed adverse, but in fact friendly, source."

In that case the demurrer admitted the allegation of the complaint that the combination of the two interests asking for the concession from the common council was known and announced to that body before its decision was made. The case simply shows the part which concealment takes in a combination, being in fact one of the great dangers springing therefrom.

In *Atcheson v. Mallon*, 43 N. Y. 147, 151, Judge Folger, in delivering the opinion of the court, said:

"But a joint proposal, the result of honest coöperation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk, as well as the profit, is joint, and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

We have here nothing to do with a combination of interest which is open and avowed, which appears upon the face of the bid and which is therefore known to all. Such a combination is frequently proper, if not essential, and, where no concealment is practised and the fact is known, there may be no ground whatever for judging it to be in any manner improper.

But in this case there is more even than concealment. There is the active fraud in the putting in of these, in substance, fictitious bids, in their different names, but in truth forming no competitive bids, and put in for the purpose already stated. It is not too much to say that the most perfect

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good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest. The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result.

The evidence shows that this written partnership agreement was only a part of the entire agreement existing between the parties. That agreement covered and was clearly intended to cover their whole action from the time they agreed to put in their bids in a common interest up to and including the execution and performance of the contract obtained from the city. The agreement (of which that for a partnership was but a portion) was that they should combine their interests; that they should put in bids known to each; that they should conceal the fact of their combination; that they should put in fictitious bids without expectation or purpose of having them taken; that if the contract were procured they should perform the work as partners and share expenses and divide profits. No division of that contract into two periods, the one prior and the other subsequent to the written agreement between the parties, can be made. The complainant cannot count only upon the contract of partnership as evidenced by the writing of March, 1893. That writing evidenced only a portion of the agreement that had been made between these parties, the result being that, although their agreement was in the first instance by parol, a portion of it was subsequently reduced to writing. The whole contract is none the less one and indivisible, just as much as if it had all been put in writing. If it had been, it would scarcely be argued that complainant might maintain an action by relying on that part of it which was valid and relating to the partnership between them, and that he might discard or omit to prove that portion which was illegal. If the complainant did not, the defendant could, prove the whole contract, as well the part lying in parol as that which was reduced to writing, so that the court might, upon an inspection of the whole contract, determine therefrom its character. The unity of the

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contract is not severed or its meaning or effect in any degree altered by putting part of it in writing and leaving the rest in parol.

Concluding as we do that this agreement between these parties is as a whole of an illegal nature, and that the portion thereof which is reduced to writing cannot be separated from the balance of the agreement, the question then arises as to the result of such conclusion upon the parties to the agreement.

There are several old and very familiar maxims of the common law which formulate the result of that law in regard to illegal contracts. They are cited in all law books upon the subject and are known to all of us. They mean substantially the same thing and are founded upon the same principles and reasoning. They are: *Ex dolo malo non oritur actio*; *Ex pacto illicito non oritur actio*; *Ex turpi causa non oritur actio*. About the earliest illustration of this doctrine is almost traditional in the famous case of *The Highwayman*. It is stated that Lord Kenyon once said, by way of illustration, that he would not sit to take an account between two robbers on Hounslow Heath, and it was questioned whether the legend in regard to the highwayman did not arise from that saying. It seems, however, that the case was a real one. He did file a bill in equity for an accounting against his partner, although it was no sooner filed and its real nature discovered than it was dismissed with costs, and the solicitors for the plaintiff were summarily dealt with by the court as for a contempt in bringing such a case before it. (1 Lindley on Partnership, 5th ed. 94, note n; 9 Law Quarterly Review, (London) pp. 105-197.)

The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis*.

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The following are only a few of the numerous cases upon the subject in England and in this country: *Holman v. Johnson*, (1775) 1 Cowper, 341; *Booth v. Hodgson*, (1795) 6 T. R. 405; *Thomson v. Thomson*, (1802) 7 Ves. 468; *Shiffner v. Gordon*, (1810) 12 East, 296; *Sykes v. Beadon*, (1879) L. R. 11 Ch. Div. 170; *Scott v. Brown*, (1892) 2 Q. B. D. 724; *Belding v. Pitkin*, (1804) 2 Caines, 147a; *Atcheson v. Mallon*, (1870) 43 N. Y. 147; *Leonard v. Poole*, (1889) 114 N. Y. 371; *Wheeler v. Russell*, (1821) 17 Mass. 258, 281; *Snell v. Dwight*, (1876) 120 Mass. 9; *Marshall v. Baltimore & Ohio Railroad Co.*, (1853) 16 How. 314, 334; *McBlair v. Gibbes*, (1854) 17 How. 232; *Coppell v. Hall*, (1868) 7 Wall. 542; *Trist v. Child*, (1874) 21 Wall. 441, 448; *Woodstock Iron Company v. Richmond & Danville Extension Co.*, (1888) 129 U. S. 643; 1 Lindley on Partnership, 5th ed. 93, note, giving the result of the American cases.

The general proposition is not disputed, but certain explanations as to its meaning and extent have been announced by the courts in cases now to be referred to, and the effort has been to show that the case before us comes under some of the exceptions to the rule, and ought not to be governed by the so-called harshness of the rule itself.

If the partnership agreement that is contained in the writing above set forth is in truth but part of an entire agreement, which contains utterly illegal provisions, then this action cannot be maintained within any of the authorities.

It is only by proving the partnership agreement as an entire agreement, separate and free from the balance of the agreement between the parties, that argument can be made in favor of its validity. It has been sometimes said that where a contract, although it be illegal, has been fully executed between the parties so that nothing remains thereof for completion, if the plaintiff can recover from the defendant moneys received by him without resorting to the contract, the court will permit a recovery in such case. The cases cited as illustrating the exception are, among others, *Tenant v. Elliott*, (1797) 1 Bos. & Pul. 2; *Farmer v. Russell*, (1798) 1 Bos. & Pul. 295; *Sharp v. Taylor*, (1849) 2 Phil. Ch. 801, 817;

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Armstrong v. Toler, (1826) 11 Wheat. 258, 269; *McBlair v. Gibbes*, *supra*, 17 How. 232, 235; *Brooks v. Martin*, (1863) 2 Wall. 70; *Planters' Bank v. Union Bank*, (1872) 16 Wall. 483; *Armstrong v. American Exchange National Bank of Chicago*, (1889) 133 U. S. 433, 466.

Upon the point as to the ability of the plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal. *Booth v. Hodgson*, 6 T. R. 405, 408; *Thomson v. Thomson*, 7 Ves. 468; *Embrey v. Jemison*, 131 U. S. 336, 348.

In the first of the above cases the plaintiff sought to maintain his action by referring to that part of the contract which was not illegal, and to ask a recovery upon that alone. Lord Kenyon, Chief Justice, observed that it seemed to be admitted by counsel for plaintiff "That if the whole case were disclosed to the court there was no foundation for the demand. They say to the court, 'suffer us to garble the case, to suppress such parts of the transaction as we please, and to impose that mutilated state of it on the court as the true and genuine transaction, and then we can disclose such a case as will enable our clients to recover in a court of law.' Such is the substance of this day's argument. It is a maxim in our law that a plaintiff must show that he stands on a fair ground when he calls on a court of justice to administer relief to him."

Mr. Justice Ashhurst, in the same case, said: "The plaintiffs wish us to decide this case on a partial statement of the facts, thereby admitting that if the whole case be disclosed they have no prospect of success; but we must take the whole case together, and upon that the plaintiffs cannot recover."

Mr. Justice Grose said: "We cannot decide on a part of the case; and taking the whole together, an assumpsit cannot be raised from one part of the case when the other parts

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of it negative an assumption." The defendant therefore had judgment.

In *Thomson v. Thomson*, *supra*, the plaintiff was not permitted to recover, because he had no claim to the money except through the medium of an illegal agreement. The Master of the Rolls (Sir William Grant) said: "If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person; who could not have set up this objection (the illegality of the contract) as a reason for not performing his trust. *Tenant v. Elliott* is, I think, an authority for that. But in this instance it is paid to the party; for there can be no difference as to the payment to his agent. Then how are you to get at it, except through this agreement. There is nothing collateral; in respect of which, the agreement being out of the question, a collateral demand arises; as in the case of stock jobbing differences. Here you cannot stir a step but through that illegal agreement; and it is impossible for the court to enforce it. I must therefore dismiss the bill."

And in *Embrey v. Jemison*, *supra*, although the action was upon four negotiable notes, the court would not permit a recovery to be had upon them, because the consideration for the notes was based upon a contract which was illegal. Mr. Justice Harlan, in delivering the opinion of the court, said that the plaintiff could not "be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value, in the hands of the defendant, which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of, and are directly connected

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with, a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defence he makes is not allowed for his sake, but to maintain the policy of the law," citing *Coppell v. Hall*, 7 Wall. 542, 558.

In the latter case Mr. Justice Swayne, delivering the opinion of the court, said :

" Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

These authorities uphold the principle that the whole case may be shown, and the plaintiff cannot prevent it by proving only so much as might sustain his cause of action, and then objecting that the defendant himself brings in the balance, which it was not necessary for plaintiff to prove.

The cases above cited as illustrative of the exceptions to the general rule also show what is meant by the cause of action being founded on some new consideration, or upon a contract collateral to the original illegal one.

In *Tenant v. Elliott*, *supra*, it was held that where two persons had entered into an illegal contract in regard to insurance, and a loss having occurred, the insurer paid the money to a third person to be paid to plaintiff, the third person could not himself retain the money because it arose out of an illegal contract. Eyre, Chief Justice, asked, " Whether he who had received the money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him ? "

In such case clearly the defendant had nothing whatever to do with the illegality of the original contract. He received

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the money to be paid to another, and when he received it for that purpose he promised, either expressly or by implication arising from the facts, that he would deliver the money to the plaintiff, and when he refused to do it the plaintiff could recover upon this express or implied contract, without resorting in any manner to the original contract between himself and another, which in its nature was illegal, but with which the defendant was in nowise concerned.

Farmer v. Russell, *supra*, is to the same effect. The defendant received the money from a third person to deliver to the plaintiff, and it was held that he was bound to pay it to the plaintiff, although the original consideration upon which the money was to be paid the plaintiff by the third person was illegal. Eyre, Chief Justice, said :

"It seems to me that the plaintiff's demand arises simply out of the circumstances of money being put into the defendant's hands to be delivered to him. This creates an *indebitatus*, from which an *assumpsit* in law arises, and on that an action on the case may be maintained. . . . The case therefore is brought to this, that the money is got into the hands of a person who was not a party to the contract, who has no pretence to retain it, and to whom the law could not give it by rescinding the contract. Though the court will not suffer a party to demand a sum of money in order to fulfil an illegal contract, yet there is no reason why the money in this case should not be recovered notwithstanding the original contract was void. The difficulty with me is, that the contract with the carrier cannot be connected with the contract between the plaintiff and the man at Portsmouth, and in that view I think the verdict is not to be supported. However, I incline to a new trial on another ground. It does not clearly appear that the defendant was not himself a party to the original contract; for there was a circumstance in the report which gave much countenance to the idea that the carrier knew what he was doing, viz., that he was lending his assistance to an infamous traffic. In that case, the rule *Melior est conditio possidentis* will apply; for if the contract with him be stained by anything illegal, the plaintiff shall not be heard in a court of law."

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The verdict in this case had been for the defendant.

There was a question in the case whether the defendant was privy to the contract between the plaintiff and the man at Portsmouth. The goods transported were counterfeit pennies or half-pence, and it was the opinion of Eyre, Chief Justice, that if the defendant had been privy to the original illegal agreement so that the whole thing was but one transaction, the plaintiff could not have recovered. Mr. Justice Rooke was of opinion that it was not important whether the defendant were privy or not; that if the contract were illegal, the plaintiff could not recover from the defendant in any event. The other two judges were of opinion that the money having been delivered to the defendant for the purpose of being paid to the plaintiff, the defendant was bound to make such payment without reference to the illegality in the original transaction.

The difference in the principle upon which a recovery was allowed in these two cases and that upon which the defence in this case is based is very clear. In the case before us the cause of action grows directly out of the illegal contract, and if the court distributes the profits it enforces the contract which is illegal. But where A claims money from B, although due upon an illegal contract, and B acknowledges the obligation and waives the defence of illegality and pays the money to a third party upon his promise to pay it to A, the third party cannot successfully defend an action brought by A to recover the money by alleging that the original contract between A and B was illegal. This is the principle decided, and we think correctly decided, in the cases cited. It was certainly no business of the third party to inquire into the reasons which impelled the person to give him the money to pay to the plaintiff. That was a matter between those parties, and if the party from whom the money was due admitted his indebtedness and chose to pay it, the defendant, who received it upon his promise to pay the plaintiff, would have no possible defence to an action by the plaintiff to compel such payment. Such an action is in no sense founded upon an illegal contract. That matter was closed when the party

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owing the money under it paid it to a third person to be paid to the plaintiff. The action by the plaintiff in such case is founded upon a new contract upon a totally different consideration and of a perfectly legitimate character.

The next case cited by complainant as an authority for the maintenance of this action is *Sharp v. Taylor, supra*. It was stated by the Chancellor in that case that where one of two partners had possessed himself of the property of the firm, he could not be allowed to retain it by merely showing that in realizing it some provision of some act of Parliament had been violated or neglected or that some provision of a foreign statute relating to the registry of vessels had not been complied with.

Lord Chancellor Cottenham, in the course of his opinion, said :

"The violation of law suggested was not any fraud upon the revenue, or omission to pay what might be due; but, at most, an invasion of a Parliamentary provision, supposed to be beneficial to the ship owners of this country; an evil, if any, which must remain the same, whether the freight be divided between Sharp and Taylor, according to their shares, or remain altogether in the hands of Taylor. As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? In this particular suit, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some act of Parliament has been violated or neglected? Can one of two partners, in any import trade, defeat the other, by showing that there was some irregularity in passing the goods through the custom house? The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties. Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in

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Tenant v. Elliott and *Farmer v. Russell*, and recognized and approved by Sir William Grant in *Thomson v. Thomson*. But the alleged illegality in this case was not in the freight being paid to English subjects claiming as owners of the ship, as in *Campbell v. Innes*. The importation of the goods in a ship American built, and not professing to have any English registry, would not be illegal, and the American owner might assign the freight to any one: assuming this to be so, I am of opinion that, under the authorities referred to, Taylor, who received the freight on account of himself and Sharp, cannot set up this defence to Sharp's claim. Upon these grounds, therefore, independently of the submission in the answer, this part of the decree is, I think, right."

These observations show that the judgment did not go upon the illegality arising from a mere violation or neglect of a provision of an act of Parliament relating to vessels, and the agreement was not classed among those contracts which are of such an illegal nature that courts refuse to enforce them. Some of the observations of the Chancellor, made by way of illustration regarding the rule itself, have been since doubted by the English courts, as in the case of *Sykes v. Beadon*, *supra*, where Jessel, Master of the Rolls, in holding that an illegal contract could not be enforced by one party to it as against the other, directly or indirectly, said that there were several dicta of Lord Cottenham's in *Sharp v. Taylor*, which he thought were not good law, and the Master of the Rolls remarked:

"It is no part of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract, between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other."

Continuing, the Master of the Rolls observed:

"Then Lord Cottenham goes on, in *Sharp v. Taylor*, to say: 'Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant v. Elliott* and *Farmer v. Russell*,

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and recognized and approved by Sir William Grant in *Thomson v. Thomson*.’ Yes; but not in that way. I have already explained what those cases were. Those were not cases in which one of the two parties to an illegal contract sought to recover from the other a share of the proceeds of the illegal contract. Then he goes on to distinguish *Sharp v. Taylor* in a way which probably distinguishes it from cases which would be open to exception on the ground of criminality. Those are all the authorities to which I think it necessary to refer. I think the principle is clear that you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it directly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it.”

Sharp v. Taylor should not be carried at all beyond the facts of the case as set out in the report.

In *McBlair v. Gibbes*, *supra*, the question was in relation to the validity of an assignment by an assignor of his interest in an illegal contract. The payment of the money arising therefrom had been, subsequently to the assignment, provided for by the party owing it, and the dispute arose between the representatives of the assignor and those of the assignee as to which were entitled to the share originally due to the assignor. It was claimed on the part of the representatives of the assignor that the original contract being illegal, the sale and assignment of an interest therein from him to the assignee was also illegal, and consequently that such interest, equitable or legal, passed to the assignor’s executors. Mr. Justice Nelson, however, in delivering the opinion of the court, said:

“But this position is not maintainable. The transaction, out of which the assignment to Oliver arose, was uninfected with any illegality. The consideration paid was not only legal, but meritorious, the relinquishment of a debt due from Goodwin to him. The assignment was subsequent, collateral to, and wholly independent of, the illegal transactions upon which the principal contract was founded. Oliver (the as-

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signee) was not a party to these transactions, nor in any way connected with them. It may be admitted that even a subsequent collateral contract, if made in aid and in furtherance of the execution of one infected with illegality, partakes of its nature, and is equally in violation of law; but that is not this case. Oliver, by the assignment, became simply owner in the place of Goodwin, and as to any public policy or concern supposed to be involved in the making, or in the fulfilment of such contracts, it was a matter of entire indifference to which it belonged. The assignee took it, liable to any defence, legal or equitable, to which it was subject in the hands of Goodwin. In consequence of the illegality the contract was invalid, and incapable of being enforced in a court of justice. The fulfilment depended altogether upon the voluntary act of Mina, or of those representing him. No obligation existed, except what arose from a sense of honor on the part of those deriving a benefit from the transaction out of which it arose. Its value rested upon this ground, and this alone. The demand was simply a debt of honor. But if the party who might set up the illegality chooses to waive it, and pay the money, he cannot afterwards reclaim it. And, if even the money be paid to a third person for the other party, such third person cannot set up the illegality of the contract on which the payment has been made, and withhold it for himself."

What is meant by a collateral contract or a cause of action arising therefrom, which does not require reference to the principal illegal contract or transaction, is still further illustrated in *Armstrong v. Toler*, 11 Wheat. 258. In the course of his opinion Mr. Chief Justice Marshall assumed the facts to be that the plaintiff, during a war between this country and Great Britain, contrived a plan for importing goods on his own account from the country of the enemy, and goods were also sent to B by the same vessel. The plaintiff, at the request of B, became surety for the payment of the duties which accrued on the goods of B and was compelled to pay them, and the question was whether he could maintain an action on the promise of B to return this money, and the

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court held that such an action could be sustained. The court said:

"The case does not suppose A to be concerned, or in any manner instrumental in promoting the illegal importation of B, but to have been merely engaged himself in a similar illegal transaction, and to have devised the plan for himself, which B afterwards adopted."

And again: "The questions whether the plaintiff had any interest in the goods of the defendant, or was the contriver of, or concerned in, a scheme to introduce them, or consented to become the consignee of the defendant's goods, with a view to their introduction, were left to the jury. The point of law decided is, that a subsequent independent contract, founded on a new consideration, is not contaminated by the illegal importation, although such illegal importation was known to Toler, when the contract was made, provided he was not interested in the goods, and had no previous concern in their importation."

And at page 274: "In most of the cases cited by the counsel for the plaintiff in error, the suit has been brought by a party to the original transaction, or on a contract so connected with it as to be inseparable from it. As, where a vendor in a foreign country packs up goods for the purpose of enabling the vendee to smuggle them; or where a suit is brought on a policy of insurance on an illegal voyage; or on a contract which amounts to maintenance; or on one for the sale of a lottery ticket, where such sale is prohibited; or on a bill which is payable in notes issued contrary to law. In these, and in all similar cases, the consideration of the very contract on which the suit is brought is vicious, and the plaintiff has contributed to the illegal transaction."

The case of *Armstrong v. American Exchange Bank*, *supra*, is similar to the cases of *Tenant v. Elliott* and *Farmer v. Russell*, and was decided upon the same principle.

Counsel for the complainant also refer to a case where a plaintiff had let his horse to the defendant on Sunday, and the defendant had injured the horse by his recklessness and negligence, and a recovery against him was had for the damages.

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occasioned by such negligence, notwithstanding the illegality of the contract of hiring, because in violation of the law relating to the Sabbath day. *Hall v. Corcoran*, 107 Mass, 251.

In that case the court held the cause of action was not founded upon the contract, but the defendant was held liable by reason of his improper and neglectful conduct in regard to the horse in his possession, and which conduct was a violation of the legal duty he owed to the owner of such horse, irrespective of contract. The case was a clear instance of a proper recovery based upon collateral facts, and not founded upon any original illegal contract.

The same principle was held in *Welch v. Wesson*, 6 Gray, 505, as the damage done plaintiff by the wilful act of defendant in running into him with his sleigh had nothing to do with the race they were engaged in.

To the same effect is *Woodman v. Hubbard*, 5 Foster, [N. H.] 67. The act of damage to the horse upon which the liability rested was not connected with or part of the illegal Sunday hiring.

We think it clear that these cases cited as authority for a recovery in this case upon the ground of completion of the illegal contract or of a new contract upon a good consideration, do not touch the case before us, with the possible exception of *Sharp v. Taylor*, *supra*, and that case ought not to be extended.

In the case at bar, the action depends upon the entire contract between the parties, part of which we hold was illegal. The partnership part of the agreement cannot be separated from the rest. The complainant's claim to profits rests upon the entire contract; his right is based upon that which is illegal and utterly void, and he cannot separate his cause of action from the illegal part, and claim a recovery upon the written portion providing for and evidencing the partnership.

We come now to a consideration of the two cases upon which the counsel for the complainant specially rely for the maintenance of this action. They are *Brooks v. Martin*, 2 Wall. 70, and *Planters' Bank v. Union Bank*, 16 Wall. 483. Of the

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two cases, *Brooks v. Martin* is the more like this one, although the cases are by no means precisely similar. The partnership in that case was stated by the court, in its opinion, to have been really engaged, probably with the full knowledge of all its members, in dealing in soldiers' claims long before any scrip or land warrants were issued by the Government and contrary to the ninth section of the act of February 11, 1847, providing for the granting of land warrants to be issued to the soldiers.

The main object of the ninth section of the act was, as the court stated, to protect the soldiers against improper contracts of the precise character of those shown in the record. It was further said that the traffic for which this partnership was formed was illegal, and that if a soldier who had sold his claim to these partners had refused to perform his contract or to do any act which was necessary to give them the full benefit of their purchase, no court would have compelled him to do it or give them any relief against it; or if one of the partners, after the signing of the articles, had said to the other, "I refuse to proceed with this partnership because the purposes of it are illegal," the other partner would have been entirely without remedy. And if, on the other hand, one of the partners had said, "I have bought one hundred soldiers' claims, for which I have agreed to pay a certain sum which I require you to advance, according to your contract," the other partner might have refused to comply with such demand, and no court would have given either of the partners any remedy for such refusal.

The court further stated that upon the facts existing, all the claims purchased by the partner having been turned into land warrants and the warrants having been sold or located, and where the purchase of the claim had been made prior to the date of the warrant, assignments having been subsequently made by the soldiers, and the portion of the lands located having been sold partly for cash and partly on mortgage, and the assets of the partnership consisting then almost wholly of cash securities or of lands;—all these facts appearing, the partner in whose possession the profits of the partnership

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were could be compelled to account by the other partner, and that the fact that such partner had given a release procured from him by fraud was no bar to his action for such an accounting.

The action was sustained upon the theory that the purpose of the partnership agreement had been fully closed and completed; that substantially all the profits arising therefrom had been invested in other securities or in lands; and that therefore it did not lie in the mouth of the partner who had by fraudulent means obtained possession and control of these funds to say to the other that the original contract was illegal. The wrong originally done or intended to the soldier had been wiped out by the acts of the soldier and his waiver of any claim by reason of the illegal contract. The transactions which were illegal, the court said, had become accomplished facts, and could not be affected by any action which the court might take. The cases of *Sharp v. Taylor, Tenant v. Elliott, Farmer v. Russell, Thomson v. Thomson* and *McBlair v. Gibbes* were cited as authority for the proposition.

We have already adverted to each of them, and we admit it is quite difficult to see how, with the exception of *Sharp v. Taylor*, the principle upon which they were decided could be applied to the case then before the court.

There is a difference between the case before us and that of *Brooks v. Martin*, because in the latter case the fact existed that the transactions, in regard to which the cause of action was based, were not fraudulent, and they related in some sense to private matters, while in the case before the court the entire contract was a fraud and was illegal, and related to a public letting by a municipal corporation for work involving a large amount of money, and in which the whole municipality was vitally interested. It may be difficult to base a distinction of principle upon these differences. We do not now decide whether they exist or not. We simply say that taking that case into due and fair consideration, we will not extend its authority at all beyond the facts therein stated. We think it should not control the decision of the case now before us.

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In *Planters' Bank v. Union Bank*, *supra*, Confederate bonds had been sent by one party to the other for sale, and the bonds had been sold by such party as agent of the plaintiff and their price paid to such agent of the party selling, and the court held that an action would lie to recover the proceeds of that sale thus paid to the plaintiff's agent, although no suit could have been maintained by plaintiff against the purchaser for the purchase price of the bonds, because their sale was an illegal transaction. But when the purchase price of the bonds was paid, it certainly did not rest with the person who received the money upon an express or implied promise to pay it over to set up the illegality of the original transaction. When the bank received the funds, there was raised an implied promise to pay them to their owner, and a recovery could be sustained upon the same ground taken in *Tenant v. Elliott* and the other cases above mentioned.

It is impossible to refer to all the cases cited from the various state courts regarding this question. Some of them we should hesitate to follow. The cases we have commented upon we think give no support for the claim that the case now before us forms any exception to the rule which, as we believe, clearly embraces it. We must take the whole agreement, and remember that the action is between the original parties to it; that there is no collateral contract and no new consideration and no liability of a third party. The partnership is but a portion of the whole agreement.

We must, therefore, come back to the proposition that to permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defence is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal

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contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law.

Being of the opinion that the contract proved in this case was illegal in the sense that it was fraudulent, and entered into for improper purposes, the law will leave the parties as it finds them.

The judgment of the Circuit Court of Appeals was right, and must be

Affirmed.